Appendix A

United States Court of Appeals,
District of Columbia Circuit.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., Appellee,
v.
VERIZON INTERNET SERVICES, INC., Appellant.

Nos. 03-7015 & 03-7053.

Argued Sept. 16, 2003.
Decided Dec. 19, 2003.

Before: GINSBURG, Chief Judge,and ROBERTS, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge GINSBURG.

GINSBURG, Chief Judge:

This case concerns the Recording Industry Association of America's use of the subpoena provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(h), to identify internet users the RIAA believes are infringing the copyrights of its members. The RIAA served two subpoenas upon Verizon Internet Services in order to discover the names of two Verizon subscribers who appeared to be trading large numbers of .mp3 files of copyrighted music via "peer-to- peer" (P2P) file sharing programs, such as KaZaA. Verizon refused to comply with the subpoenas on various legal grounds.

The district court rejected Verizon's statutory and constitutional challenges to § 512(h) and ordered the internet

service provider (ISP) to disclose to the RIAA the names of the two subscribers. On appeal Verizon presents three alternative arguments for reversing the orders of the district court: (1) § 512(h) does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for communications the content of which is determined by others; if the statute does authorize such a subpoena, then the statute is unconstitutional because (2) the district court lacked Article III jurisdiction to issue a subpoena with no underlying "case or controversy" pending before the court; and (3) § 512(h) violates the First Amendment because it lacks sufficient safeguards to protect an internet user's ability to speak and to associate anonymously. Because we agree with Verizon's interpretation of the statute, we reverse the orders of the district court enforcing the subpoenas and do not reach either of Verizon's constitutional arguments.[1]

I. Background

Individuals with a personal computer and access to the internet began to offer digital copies of recordings for download by other users, an activity known as file sharing, in the late 1990's using a program called Napster. Although recording companies and music publishers successfully obtained an injunction against Napster's facilitating the sharing of files containing copyrighted recordings, *see A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), millions of people in the United States and around the world continue to share digital .mp3 files of copyrighted

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[1] The district court's jurisdiction to issue the orders here under review is not drawn into question by Verizon's Article III argument. *See Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 476-78, 14 S. Ct. 1125, 1132-34, 38 L. Ed. 1047 (1894) (application of ICC to enforce subpoena issued by agency in furtherance of investigation presents "case or controversy" subject to judicial resolution).

recordings using P2P computer programs such as KaZaA, Morpheus, Grokster, and eDonkey. *See* John Borland, *File Swapping Shifts Up a Gear* (May 27, 2003), *available at* http://news.com.com/2100-1026-1009742.html, (last visited December 2, 2003). Unlike Napster, which relied upon a centralized communication architecture to identify the .mp3 files available for download, the current generation of P2P file sharing programs allow an internet user to search directly the .mp3 file libraries of other users; no web site is involved. *See* Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. LAW & TECH. 395, 403, 408-09 (2003). To date, owners of copyrights have not been able to stop the use of these decentralized programs. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003) (holding Grokster not contributorily liable for copyright infringement by users of its P2P file sharing program).

The RIAA now has begun to direct its anti-infringement efforts against individual users of P2P file sharing programs. In order to pursue apparent infringers the RIAA needs to be able to identify the individuals who are sharing and trading files using P2P programs. The RIAA can readily obtain the screen name of an individual user, and using the Internet Protocol (IP) address associated with that screen name, can trace the user to his ISP. Only the ISP, however, can link the IP address used to access a P2P program with the name and address of a person - the ISP's customer - who can then be contacted or, if need be, sued by the RIAA.

The RIAA has used the subpoena provisions of § 512(h) of the Digital Millennium Copyright Act (DMCA) to compel ISPs to disclose the names of subscribers whom the RIAA has reason to believe are infringing its members' copyrights. *See* 17 U.S.C. § 512(h)(1) (copyright owner may "request the

clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer"). Some ISPs have complied with the RIAA's § 512(h) subpoenas and identified the names of the subscribers sought by the RIAA. The RIAA has sent letters to and filed lawsuits against several hundred such individuals, each of whom allegedly made available for download by other users hundreds or in some cases even thousands of .mp3 files of copyrighted recordings. Verizon refused to comply with and instead has challenged the validity of the two § 512(h) subpoenas it has received.

A copyright owner (or its agent, such as the RIAA) must file three items along with its request that the Clerk of a district court issue a subpoena: (1) a "notification of claimed infringement" identifying the copyrighted work(s) claimed to have been infringed and the infringing material or activity, and providing information reasonably sufficient for the ISP to locate the material, all as further specified in § 512(c)(3)(A); (2) the proposed subpoena directed to the ISP; and (3) a sworn declaration that the purpose of the subpoena is "to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting" rights under the copyright laws of the United States. 17 U.S.C. §§ 512(h)(2)(A)-(C). If the copyright owner's request contains all three items, then the Clerk "shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the [ISP]." 17 U.S.C. § 512(h)(4). Upon receipt of the subpoena the ISP is "authorize[d] and order[ed]" to disclose to the copyright owner the identity of the alleged infringer. *See* 17 U.S.C. §§ 512(h)(3), (5).

On July 24, 2002 the RIAA served Verizon with a subpoena issued pursuant to § 512(h), seeking the identity of a subscriber whom the RIAA believed to be engaged in

infringing activity. The subpoena was for "information sufficient to identify the alleged infringer of the sound recordings described in the attached notification." The "notification of claimed infringement" identified the IP address of the subscriber and about 800 sound files he offered for trading; expressed the RIAA's "good faith belief" the file sharing activity of Verizon's subscriber constituted infringement of its members' copyrights; and asked for Verizon's "immediate assistance in stopping this unauthorized activity." "Specifically, we request that you remove or disable access to the infringing sound files via your system."

When Verizon refused to disclose the name of its subscriber, the RIAA filed a motion to compel production pursuant to Federal Rule of Civil Procedure 45(c)(2)(B) and § 512(h)(6) of the Act. In opposition to that motion, Verizon argued § 512(h) does not apply to an ISP acting merely as a conduit for an individual using a P2P file sharing program to exchange files. The district court rejected Verizon's argument based upon "the language and structure of the statute, as confirmed by the purpose and history of the legislation," and ordered Verizon to disclose to the RIAA the name of its subscriber. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 45 (D.D.C. 2003) (*Verizon I*).

The RIAA then obtained another § 512(h) subpoena directed to Verizon. This time Verizon moved to quash the subpoena, arguing that the district court, acting through the Clerk, lacked jurisdiction under Article III to issue the subpoena and in the alternative that § 512(h) violates the First Amendment. The district court rejected Verizon's constitutional arguments, denied the motion to quash, and again ordered Verizon to disclose the identity of its subscriber. *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 247, 275 (D.D.C. 2003) (*Verizon II*).

Verizon appealed both orders to this Court and we consolidated the two cases. As it did before the district court, the RIAA defends both the applicability of § 512(h) to an ISP acting as a conduit for P2P file sharing and the constitutionality of § 512(h). The United States has intervened solely to defend the constitutionality of the statute.

II. Analysis

The court ordinarily reviews a district court's grant of a motion to compel or denial of a motion to quash for abuse of discretion. *See, e.g., In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997). Here, however, Verizon contends the orders of the district court were based upon errors of law, specifically errors regarding the meaning of § 512(h). Our review is therefore plenary. *See In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992).

The issue is whether § 512(h) applies to an ISP acting only as a conduit for data transferred between two internet users, such as persons sending and receiving e-mail or, as in this case, sharing P2P files. Verizon contends § 512(h) does not authorize the issuance of a subpoena to an ISP that transmits infringing material but does not store any such material on its servers. The RIAA argues § 512(h) on its face authorizes the issuance of a subpoena to an "[internet] service provider" without regard to whether the ISP is acting as a conduit for user-directed communications. We conclude from both the terms of § 512(h) and the overall structure of § 512 that, as Verizon contends, a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity.

A. Subsection 512(h) by its Terms

We begin our analysis, as always, with the text of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 950, 151 L. Ed. 2d 908 (2002). Verizon's statutory arguments address the meaning of and interaction between §§ 512(h) and 512(a)-(d). Having already discussed the general requirements of § 512(h), we now introduce §§ 512(a)-(d).

Section 512 creates four safe harbors, each of which immunizes ISPs from liability for copyright infringement under certain highly specified conditions. Subsection 512(a), entitled "Transitory digital network communications," provides a safe harbor "for infringement of copyright by reason of the [ISP's] transmitting, routing, or providing connections for" infringing material, subject to certain conditions, including that the transmission is initiated and directed by an internet user. *See* 17 U.S.C. §§ 512(a)(1)-(5). Subsection 512(b), "System caching," provides immunity from liability "for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the [ISP]," § 512(b)(1), as long as certain conditions regarding the transmission and retrieval of the material created by the ISP are met. *See* 17 U.S.C. §§ 512(b)(2)(A)-(E). Subsection 512(c), "Information residing on systems or networks at the direction of users," creates a safe harbor from liability "for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider," as long as the ISP meets certain conditions regarding its lack of knowledge concerning, financial benefit from, and expeditious efforts to remove or deny access to, material that is infringing or that is claimed to be the subject of infringing activity. *See* 17 U.S.C. §§ 512(c)(1)(A)-(C).

Finally, § 512(d), "Information location tools," provides a safe harbor from liability "for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools" such as "a directory, index, reference, pointer, or hypertext link," subject to the same conditions as in §§ 512(c)(1)(A)-(C). *See* 17 U.S.C. §§ 512(d)(1)-(3).

Notably present in §§ 512(b)-(d), and notably absent from § 512(a), is the so-called notice and take-down provision. It makes a condition of the ISP's protection from liability for copyright infringement that "upon notification of claimed infringement as described in [§ 512](c)(3)," the ISP "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing." *See* 17 U.S.C. §§ 512(b)(2)(E), 512(c)(1)(C), and 512(d)(3).

Verizon argues that § 512(h) by its terms precludes the Clerk of Court from issuing a subpoena to an ISP acting as a conduit for P2P communications because a § 512(h) subpoena request cannot meet the requirement in § 512(h)(2)(A) that a proposed subpoena contain "a copy of a notification [of claimed infringement, as] described in [§ 512](c)(3)(A)."[2] In particular, Verizon maintains the two

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[2] Subsection 512(c)(3)(A) provides that "[t]o be effective under this subsection, a notification of claimed infringement must be a written communication . . . that includes substantially the following":

> (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
>
> (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
>
> (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is

subpoenas obtained by the RIAA fail to meet the requirements of § 512(c)(3)(A)(iii) in that they do not - because Verizon is not storing the infringing material on its server - and can not, identify material "to be removed or access to which is to be disabled" by Verizon. Here Verizon points out that § 512(h)(4) makes satisfaction of the notification requirement of § 512(c)(3)(A) a condition precedent to issuance of a subpoena: "If the notification filed satisfies the provisions of [§ 512](c)(3)(A)" and the other content requirements of § 512(h)(2) are met, then "the clerk shall expeditiously issue and sign the proposed subpoena ... for delivery" to the ISP.

Infringing material obtained or distributed via P2P file sharing is located in the computer (or in an off-line storage device, such as a compact disc) of an individual user. No matter what information the copyright owner may provide, the ISP can neither "remove" nor "disable access to" the infringing material because that material is not stored on the ISP's servers. Verizon can not remove or disable one user's access to infringing material resident on another user's

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to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

17 U.S.C. § 512(c)(3)(A).

computer because Verizon does not control the content on its subscribers' computers.

The RIAA contends an ISP can indeed "disable access" to infringing material by terminating the offending subscriber's internet account. This argument is undone by the terms of the Act, however. As Verizon notes, the Congress considered disabling an individual's access to infringing material and disabling access to the internet to be different remedies for the protection of copyright owners, the former blocking access to the infringing material on the offender's computer and the latter more broadly blocking the offender's access to the internet (at least via his chosen ISP). *Compare* 17 U.S.C. § 512(j)(1)(A)(i) (authorizing injunction restraining ISP "from providing access to infringing material") *with* 17 U.S.C. § 512(j)(1)(A)(ii) (authorizing injunction restraining ISP "from providing access to a subscriber or account holder ... who is engaging in infringing activity ... by terminating the accounts of the subscriber or account holder"). "[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings." *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986). These distinct statutory remedies establish that terminating a subscriber's account is not the same as removing or disabling access by others to the infringing material resident on the subscriber's computer.

The RIAA points out that even if, with respect to an ISP functioning as a conduit for user-directed communications, a copyright owner cannot satisfy the requirement of § 512(c)(3)(A)(iii) by identifying material to be removed by the ISP, a notification is effective under § 512(c)(3)(A) if it "includes substantially" the required information; that standard is satisfied, the RIAA maintains, because the ISP can identify the infringer based upon the information

provided by the copyright owner pursuant to §§ 512(c)(3)(A)(i) - (ii) and (iv)-(vi). According to the RIAA, the purpose of § 512(h) being to identify infringers, a notice should be deemed sufficient so long as the ISP can identify the infringer from the IP address in the subpoena.

Nothing in the Act itself says how we should determine whether a notification "includes substantially" all the required information; both the Senate and House Reports, however, state the term means only that "technical errors . . . such as misspelling a name" or "supplying an outdated area code" will not render ineffective an otherwise complete § 512(c)(3)(A) notification. S. Rep. No. 105-190, at 47 (1998); H.R. Rep. No. 105-551 (II), at 56 (1998). Clearly, however, the defect in the RIAA's notification is not a mere technical error; nor could it be thought "insubstantial" even under a more forgiving standard. The RIAA's notification identifies absolutely no material Verizon could remove or access to which it could disable, which indicates to us that § 512(c)(3)(A) concerns means of infringement other than P2P file sharing.

Finally, the RIAA argues the definition of "[internet] service provider" in § 512(k)(1)(B) makes § 512(h) applicable to an ISP regardless what function it performs with respect to infringing material - transmitting it per § 512(a), caching it per § 512(b), hosting it per § 512(c), or locating it per § 512(d).

This argument borders upon the silly. The details of this argument need not burden the Federal Reporter, for the specific provisions of § 512(h), which we have just rehearsed, make clear that however broadly "[internet] service provider" is defined in § 512(k)(1)(B), a subpoena may issue to an ISP only under the prescribed conditions regarding notification. Define all the world as an ISP if you like, the validity of a § 512(h) subpoena still depends upon the

copyright holder having given the ISP, however defined, a notification effective under § 512(c)(3)(A). And as we have seen, any notice to an ISP concerning its activity as a mere conduit does not satisfy the condition of § 512(c)(3)(A)(iii) and is therefore ineffective.

In sum, we agree with Verizon that § 512(h) does not by its terms authorize the subpoenas issued here. A § 512(h) subpoena simply cannot meet the notice requirement of § 512(c)(3)(A)(iii).

B. Structure

Verizon also argues the subpoena provision, § 512(h), relates uniquely to the safe harbor in § 512(c) for ISPs engaged in storing copyrighted material and does not apply to the transmitting function addressed by the safe harbor in § 512(a). Verizon's claim is based upon the "three separate cross - references" in § 512(h) to the notification described in § 512(c)(3)(A). First, as we have seen, § 512(h)(2)(A) requires the copyright owner to file, along with its request for a subpoena, the notification described in § 512(c)(3)(A). Second, and again as we have seen, § 512(h)(4) requires that the notification satisfy "the provisions of [§ 512](c)(3)(A)" as a condition precedent to the Clerk's issuing the requested subpoena. Third, § 512(h)(5) conditions the ISP's obligation to identify the alleged infringer upon "receipt of a notification described in [§ 512](c)(3)(A)." We agree that the presence in § 512(h) of three separate references to § 512(c) and the absence of any reference to § 512(a) suggests the subpoena power of § 512(h) applies only to ISPs engaged in storing copyrighted material and not to those engaged solely in transmitting it on behalf of others.

As the RIAA points out in response, however, because §§ 512(b) and (d) also require a copyright owner to provide a "notification . . . as described in [§ 512](c)(3)," the cross-

references to § 512(c)(3)(A) in § 512(h) can not confine the operation of § 512(h) solely to the functions described in § 512(c), but must also include, at a minimum, the functions described in §§ 512(b) and (d). Therefore, according to the RIAA, because Verizon is mistaken in stating that "the take-down notice described in [§ 512](c)(3)(A) . . . applies exclusively to the particular functions described in [§ 512](c) of the statute," the subpoena power in § 512(h) is not linked exclusively to § 512(c) but rather applies to all the ISP functions, wherever they may be described in §§ 512(a)-(d).

Although the RIAA's conclusion is a non-sequitur with respect to § 512(a), we agree with the RIAA that Verizon overreaches by claiming the notification described in § 512(c)(3)(A) applies only to the functions identified in § 512(c). As Verizon correctly notes, however, the ISP activities described in §§ 512(b) and (d) are storage functions. As such, they are, like the ISP activities described in § 512(c) and unlike the transmission functions listed in § 512(a), susceptible to the notice and take down regime of §§ 512(b)-(d), of which the subpoena power of § 512(h) is an integral part. We think it clear, therefore, that the cross-references to § 512(c)(3) in §§ 512(b)-(d) demonstrate that § 512(h) applies to an ISP storing infringing material on its servers in any capacity - whether as a temporary cache of a web page created by the ISP per § 512(b), as a web site stored on the ISP's server per § 512(c), or as an information locating tool hosted by the ISP per § 512(d) - and does not apply to an ISP routing infringing material to or from a personal computer owned and used by a subscriber.

The storage activities described in the safe harbors of §§ 512(b)-(d) are subject to § 512(c)(3), including the notification described in § 512(c)(3)(A). By contrast, as we have already seen, an ISP performing a function described in § 512(a), such as transmitting e-mails, instant messages, or

files sent by an internet user from his computer to that of another internet user, cannot be sent an effective § 512(c)(3)(A) notification. Therefore, the references to § 512(c)(3) in §§ 512(b) and (d) lead inexorably to the conclusion that § 512(h) is structurally linked to the storage functions of an ISP and not to its transmission functions, such as those listed in § 512(a).

C. Legislative History

In support of its claim that § 512(h) can - and should - be read to reach P2P technology, the RIAA points to congressional testimony and news articles available to the Congress prior to passage of the DMCA. These sources document the threat to copyright owners posed by bulletin board services (BBSs) and file transfer protocol (FTP) sites, which the RIAA says were precursors to P2P programs.

We need not, however, resort to investigating what the 105th Congress may have known because the text of § 512(h) and the overall structure of § 512 clearly establish, as we have seen, that § 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others. Legislative history can serve to inform the court's reading of an otherwise ambiguous text; it cannot lead the court to contradict the legislation itself. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 662-63, 126 L. Ed. 2d 615 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear").

In any event, not only is the statute clear (albeit complex), the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was "not even a glimmer in anyone's eye when the DMCA was enacted." *In*

re Verizon I, 240 F. Supp. 2d at 38. Furthermore, such testimony as was available to the Congress prior to passage of the DMCA concerned "hackers" who established unauthorized FTP or BBS sites on the servers of ISPs, *see Balance of Responsibilities on the Internet and the Online Copyright Liability Limitation Act: Hearing on H.R. 2180 Before the House Subcomm. on Courts and Intellectual Property, Comm. on the Judiciary*, 105th Cong. (1997) (statement of Ken Wasch, President, Software Publishers Ass'n); rogue ISPs that posted FTP sites on their servers, thereby making files of copyrighted musical works available for download, *see* Complaint, *Geffen Records, Inc. v. Arizona Bizness Network*, No. CIV. 98-0794, at ¶ 1 (D. Ariz. May 5, 1998) *available at* http://www.riaa.com/news/newsletter/pdf/geffencomplaint.pdf, (last visited December 2, 2003); and BBS subscribers using dial-up technology to connect to a BBS hosted by an ISP. The Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along. Had the Congress been aware of P2P technology, or anticipated its development, § 512(h) might have been drafted more generally. Be that as it may, contrary to the RIAA's claim, nothing in the legislative history supports the issuance of a § 512(h) subpoena to an ISP acting as a conduit for P2P file sharing.

D. Purpose of the DMCA

Finally, the RIAA argues Verizon's interpretation of the statute "would defeat the core objectives" of the Act. More specifically, according to the RIAA there is no policy justification for limiting the reach of § 512(h) to situations in which the ISP stores infringing material on its system, considering that many more acts of copyright infringement are committed in the P2P realm, in which the ISP merely transmits the material for others, and that the burden upon

an ISP required to identify an infringing subscriber is minimal.

We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress; only the "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431, 104 S. Ct. 774, 783, 78 L. Ed. 2d 574 (1984).

The stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture. It is not surprising, therefore, that even as this case was being argued, committees of the Congress were considering how best to deal with the threat to copyrights posed by P2P file sharing schemes. *See, e.g., Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Comm. On Governmental Affairs*, 108th Congress (Sept. 30, 2003); *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Senate Comm. on the Judiciary*, 108th Congress (Sept. 9, 2003).

III. Conclusion

For the foregoing reasons, we remand this case to the district court to vacate its order enforcing the July 24 subpoena and to grant Verizon's motion to quash the February 4 subpoena.

So ordered.

Appendix B

United States District Court,
District of Columbia.

In re: VERIZON INTERNET SERVICES, INC.,
Subpoena Enforcement Matter,
Recording Industry Association of America, Plaintiff,
v.
Verizon Internet Services, Defendant.

No. CIV.A.02-MS-0323(JDB).

Jan. 21, 2003.

MEMORANDUM OPINION

BATES, District Judge.

The Recording Industry Association of America ("RIAA")[1] has moved to enforce a subpoena served on Verizon Internet Services ("Verizon") under the Digital Millennium Copyright Act of 1998 ("DMCA" or "Act"), 17 U.S.C. § 512. On behalf of copyright owners, RIAA seeks the identity of an anonymous user of Verizon's service who is alleged to have infringed copyrights with respect to more than 600 songs offered for downloading over the Internet in a single day. The copyright owners (and thus RIAA) can discern the Internet Protocol address, but not the identity, of the alleged infringer--only the service provider can identify the user. Verizon argues that the subpoena relates to

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[1] RIAA is the industry trade association for sound and music recordings, whose members create and distribute the overwhelming majority of all music sold in the United States. RIAA is authorized to enforce the copyrights of its members.

material transmitted over Verizon's network, not stored on it, and thus falls outside the scope of the subpoena power authorized in the DMCA. RIAA counters that the subpoena power under section 512(h) of the DMCA applies to all Internet service providers, including Verizon, whether the infringing material is stored on or simply transmitted over the service provider's network.

The case thus presents a core issue of statutory interpretation relating to the scope of the subpoena authority under the DMCA. The parties, and several *amici curiae*, agree that this is an issue of first impression of great importance to the application of copyright law to the Internet. Indeed, they concede that this case is presented as a test case on the DMCA subpoena power. Based on the language and structure of the statute, as confirmed by the purpose and history of the legislation, the Court concludes that the subpoena power in 17 U.S.C. § 512(h) applies to all Internet service providers within the scope of the DMCA, not just to those service providers storing information on a system or network at the direction of a user. Therefore, the Court grants RIAA's motion to enforce, and orders Verizon to comply with the properly issued and supported subpoena from RIAA seeking the identity of the alleged infringer.

BACKGROUND

An assessment of this issue requires some understanding of both the DMCA and the subpoena served by RIAA on Verizon. Although the subpoena power is specifically delineated in section 512(h), that language cannot be isolated from the structure and purpose of the DMCA, and RIAA's subpoena to Verizon must be assessed in that context.

1. The Digital Millennium Copyright Act

The DMCA amended chapter 5 of the Copyright Act, 17 U.S.C. § 501 *et seq.*, and created a new section 512 entitled

"Limitations on liability relating to material online." As the title indicates, the DMCA is designed primarily to limit the liability of Internet service providers for acts of copyright infringement by customers who are using the providers' systems or networks. Section 512 contains limitations on the liability of service providers for four general categories of activity set forth in subsections (a) through (d). The statute thereby creates a series of "safe harbors" that allow service providers to limit their liability for copyright infringement by users if certain conditions under the Act are satisfied. "The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory [copyright] infringement." S. Rep. No. 105-190, at 20 (1998).

Under the DMCA, an Internet service provider falls within one of these four subsections based on how the allegedly infringing material has interacted with the service provider's system or network. To qualify for a "safe harbor," the service provider must fulfill the conditions under the applicable subsection and the conditions of subsection (*i*), which includes the requirement that a service provider implement and inform its users of its policy to terminate a subscriber's account in cases of repeat copyright infringement. *See* 17 U.S.C. § 512(*i*)(1)(A). Under subsection (a), which Verizon contends is applicable here, if the service provider meets certain conditions it will not be liable for the user's copyright infringement when the service provider transmits the copyrighted material over its system or network:

> (a) Transitory digital network communications.--A service provider shall not be liable . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing [Internet] connections for, material through a

> system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . ..

Id. § 512(a). On the other hand, subsection (c), the other subsection most relevant here, pertains to copyrighted material that is **stored** on the service provider's network or system:

> (c) Information residing on systems or networks at direction of users. -- . . . A service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . ..

Id. § 512(c)(1).[2] Under subsection (c), a service provider must also designate an agent to receive notifications of claimed infringement from copyright owners. *Id.* § 512(c)(2).

Of particular importance here, subsection (c)(3)(A) spells out requirements to be met by copyright owners for effective notification of copyright infringement under subsection (c). The notification of claimed infringement must be in a writing provided to the designated agent, and must include the following -- a "signature of a person authorized to act on behalf of the [copyright] owner"; identification of the copyrighted work allegedly infringed (or a list of multiple

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[2] Subsection (b) covers "system caching," which is the temporary storage of allegedly infringing material on the provider's system or network, while subsection (d) relates to "information location tools," which refer or link users to an online location having infringing material through the use of "a directory, index, reference, pointer, [ ] hypertext link" or other information location tool. *Id.* §§ 512(b) & (d).

copyrighted works covered by a single notification); identification of the allegedly infringing material "that is to be removed or access to which is to be disabled," and information to enable the provider to locate the material; information to permit the provider to contact the complaining party; a statement of good faith belief that the use complained of is not authorized; and a "statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner." *Id.* § 512(c)(3)(A)(i)-(vi). This notification requirement is located within subsection (c), and there is no similar notification requirement within subsection (a) or elsewhere in section 512. The subsection (c)(3) notification requirement is referenced, however, in the conditions under both subsection (b) and subsection (d). *See id.* §§ 512(b)(2)(E) & (d)(3).

The DMCA also contains a novel provision in subsection (h) -- which lies at the heart of the dispute before the Court -- permitting a copyright owner to obtain and serve a subpoena on a service provider seeking the identity of a customer alleged to be infringing the owner's copyright. The subpoena is issued by the clerk of any United States District Court upon a request by the copyright owner (or one authorized to act on the owner's behalf) containing the proposed subpoena, "a copy of a notification described in subsection (c)(3)(A)," and a sworn declaration ensuring that the subpoena is solely to obtain the identity of the alleged infringer, which information will be used only to protect rights to the copyright. *Id.* § 512(h)(2). The subpoena, in turn, authorizes and orders the recipient service provider "to expeditiously disclose" information sufficient to identify the alleged infringer. *Id.* § 512(h)(3). The clerk "shall expeditiously issue" the subpoena if it is in proper form, the declaration is properly executed, and "the notification filed satisfies the provisions of subsection (c)(3)(A)." *Id.* §

512(h)(4). The service provider, upon receipt of the subpoena, "shall expeditiously disclose" the information required by the subpoena to the copyright owner (or authorized person). *Id.* § 512(h)(5). The issuance, delivery and enforcement of subpoenas is to be governed (to the extent practicable) by the provisions of the Federal Rules of Civil Procedure dealing with subpoenas duces tecum. *Id.* § 512(h)(6).

2. RIAA's Subpoena to Verizon

On July 24, 2002, RIAA served a subpoena on Verizon seeking identifying information about an anonymous copyright infringer allegedly using Verizon's network to offer for downloading copyrighted songs through peer-to-peer software provided by KaZaA, without the copyright holders' authorization. *See* Motion to Enforce, Ex. A. Along with the subpoena, RIAA provided Verizon with a list of more than 600 files (predominantly individual songs, most by well-known artists) allegedly offered for downloading by the user on one day. *Id.*, Ex. B. The subpoena included the user's specified Internet Protocol (IP) address, to enable Verizon to locate the computer where the infringement occurred. In addition to the IP address, RIAA provided the time and date when the songs were downloaded and furnished a declaration, under penalty of perjury, that the information was sought in good faith and would only be used in connection with "protecting the rights" of RIAA members. *Id.*, Ex. B (letter from Whitehead to Crowder dated July 24, 2002). RIAA also requested that Verizon "remove or disable access to the infringing sound files." *Id.*

Verizon responded by letter refusing to comply with RIAA's subpoena. *Id.*, Ex. D (letter from Daily to Whitehead dated Aug. 6, 2002). Verizon emphasized its view that the DMCA subpoena power applies only if the infringed material is stored or controlled on the service provider's

system or network under subsection (c). *Id.* at pp. 2-3. Verizon stated: "The allegedly infringing contents of the [downloaded files] do not reside on any system or network controlled or operated by or for [Verizon], but . . . are stored on the hardware of the Customer. Thus, neither § 512(c)(3)(A) nor § 512(h) is applicable for this reason alone." *Id.* According to Verizon, a subpoena under the DMCA is "conditioned" on notification under section 512(c)(3)(A), "and that provision is addressed to 'material that resides on a system or network *controlled or operated by or for [a] service provider.*'" *Id.* (emphasis in original). In contrast, Verizon stressed, it only provided the customer with Internet connectivity service. *Id.* Verizon also refused RIAA's request to terminate the user's Internet connection. *Id.* at 3. Verizon's position, therefore, is that because it only provided the alleged infringer with an Internet connection, it falls under subsection (a) of section 512, not under subsection (c), and it is thus outside the subpoena authority of subsection (h), which Verizon contends is limited to service providers storing material under subsection (c).

RIAA, on the other hand, is of the view that the DMCA subpoena power under section 512(h) applies to all service providers within the provisions of subsections (a) through (d), including Verizon in the instant case.[3] Given Verizon's refusal to comply with the subpoena, RIAA moved pursuant to 17 U.S.C. § 512(h)(6) and Fed. R. Civ. P. 45(c)(2)(B) to enforce the subpoena. Substantial briefing (including submissions by *amici curiae* on both sides) and a hearing followed.

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[3] Hence, RIAA submits that it does not matter for purposes of enforcement of the subpoena whether Verizon comes within subsection (a) or subsection (c) in this case; in either event, RIAA contends, the subpoena is valid.

ANALYSIS

This case turns on the meaning and scope of the provisions of the DMCA. "As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002); *see also United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). If so, and if the statutory scheme is "coherent and consistent," then the inquiry ceases. *Barnhart*, 534 U.S. at 450, 122 S. Ct. 941 (quoting *Robinson*, 519 U.S. at 340, 117 S. Ct. 843). Nonetheless, "[s]tatutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (quoting *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)). Hence, "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank*, 503 U.S. at 253, 112 S. Ct. 1146. But as the Supreme Court has explained:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Id. at 254, 112 S. Ct. 1146; *accord Ron Pair Enters., Inc.*, 489 U.S. at 241-42, 109 S. Ct. 1026; *United States v. Goldenberg*, 168 U.S. 95, 102-03, 18 S. Ct. 3, 42 L. Ed. 394 (1897). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank*, 503 U.S. at 254, 112 S. Ct. 1146 (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981)); *see also Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) ("There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992).

Here, the statutory language and structure lead to a single result -- the section 512(h) subpoena authority applies to service providers within not only subsection (c) but also subsections (a), (b), and (d) of section 512. Moreover, the purpose and history of the DMCA are consistent with that conclusion.

1. Statutory Definition of "Service Provider"

The statutory text of the DMCA provides clear guidance for construing the subpoena authority of subsection (h) to apply to all service providers under the Act. The term "service provider" is employed repeatedly in subsection (h). The request to the clerk is "to issue a subpoena to a service provider for identification of an alleged infringer" (§ 512(h)(1)); the subpoena "shall authorize and order the service provider receiving the notification and the subpoena" to disclose the identifying information to the extent it is available to the service provider (§ 512(h)(3)); a proper subpoena shall be executed by the clerk, who shall return it to the requester "for delivery to the service provider" (§ 512(h)(4)); and upon receipt "the service provider shall expeditiously disclose" the information

required by the subpoena "regardless of whether the service provider responds to the notification" (§ 512(h)(5)).

The question, then, is whether the "service provider" repeatedly referenced in subsection (h) is limited to one described by subsection (c) or instead includes those described in subsections (a), (b) and (d) of section 512 as well. The DMCA answers that question unequivocally.

The Act provides two distinct definitions of "service provider" -- a narrow definition as the term is used solely within subsection (a), and a broader definition governing all other subsections, which specifically includes a "service provider" under subsection (a) as well:

> (k) Definitions. -
>
> (1) Service provider. -
>
> (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.
>
> (B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

17 U.S.C. § 512(k); *see also ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (the DMCA "defines a service provider broadly").

The textual definition of "service provider" in subsection (k) leaves no doubt, therefore, that the subpoena power in subsection (h) applies to all service providers, regardless of the functions a service provider may perform under the four categories set out in subsections (a) through (d). The broad definition in subsection (k)(1)(B) -- "a provider of online services or network access" -- expressly applies to the term "service provider" as used in subsection (h), since the narrow definition found in subsection (k)(1)(A) is applicable only to the term as used in subsection (a). By the plain text of the statute, moreover, the term "service provider" as employed in subsection (h) encompasses those entities defined in subsection (k)(1)(A), which explicitly includes "service providers" under subsection (a) such as Verizon (an "entity offering the transmission, routing, or providing of connections for digital online communications"). In short, Verizon contends that it has only provided an Internet connection, and thus is within subsection (a) of the DMCA; but the definition of "service provider" in subsection (k) applicable to the subpoena authority under subsection (h) squarely includes subsection (a) entities such as Verizon that are "providing . . . connections for digital online communications." Given the broad definition of "service provider" in subsection (k)(1)(B), and the use of that defined term throughout subsection (h), the Court must, under well-established statutory construction tools, read these provisions together, as a whole. *See United States v. Wilson*, 290 F.3d 347, 355 (D.C. Cir. 2002) ("It is the 'classic judicial task' of construing related statutory provisions 'to make sense in combination.'") (quoting *United States v. Fausto*, 484 U.S. 439, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988)). Applying the statutory definition of "service provider" leaves no doubt whatsoever, then, that the DMCA subpoena

authority reaches a subsection (a) service provider such as Verizon contends it is here.[4]

Verizon's response is to downplay the subsection (k) definition, dismissing it as "beside the point." But the language is clear, and the Court cannot overlook the governing definition of service provider in subsection (k)(1)(B), which plainly sets the scope of the subsection (h) subpoena power. Rather, the Court must take into account all relevant parts of the statute. *See United States Telecom Ass'n v. FCC*, 227 F.3d 450, 463 (D.C. Cir. 2000) (noting "the well-accepted principle of statutory construction that requires every provision of a statute to be given effect"); *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (courts have "endlessly reiterated [the] principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). "If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute." *Lilly v. Internal Revenue Service*, 76 F.3d 568, 571 (4th Cir. 1996); *see also Colautti v. Franklin*, 439 U.S. 379, 392 n. 10, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) ("[A] definition which declares what a term 'means' . . . excludes any meaning that is not stated."); *Florida Dep't of Banking & Fin. v. Board of Governors of Fed. Reserve Sys.*, 800

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[4] The legislative history of the DMCA comports with this reading of the definitional language of subsection (k). The Senate Report explains that "[t]he second definition of 'service provider,' set forth in subsection (j)(1)(b), applies to the term as used in any other subsection of section 512." S. Rep. No. 105-190, at 54 (subsection (j)(1)(b) ultimately became subsection (k)(1)(B)). "This definition includes, for example, services such as providing Internet access, e-mail, chat room and web page hosting services," and "[t]he definition also specifically includes any entity that falls within the first definition of service provider." Id. at 54-55. See also H.R. Rep. No. 105-551(II), at 64 (1998) (definition of "service provider" "includes, for example, services such as providing Internet access, email," etc.).

F.2d 1534, 1536 (11th Cir. 1986) ("It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute."). It would simply make no sense here to dismiss the statutory definition of "service provider" as irrelevant.

As Verizon explained in its letter to RIAA refusing to comply with the subpoena, "the only service [Verizon] provides to the Customer is Internet connectivity." Motion to Enforce, Ex. D, at p. 2 (letter from Dailey to Whitehead dated Aug. 6, 2002). But the broad definition of "service provider" under subsection (k)(1)(B) that is expressly applicable to subsection (h), together with the fact that Verizon indisputably provided network access to the alleged infringer, lead ineluctably to the conclusion that the subpoena authority of the DMCA applies to all service providers within the scope of the Act, including those like Verizon falling under subsection (a).

2. The Statutory Structure

Verizon's assertions to the contrary are refuted by the structure and language of the DMCA. An essential condition for a valid subpoena under subsection 512(h), Verizon claims, "is a notification to the service provider that complies with subsection (c)(3)(A)." Verizon Opp. at pp. 2-3. Therefore, Verizon argues, it is implicit that a subpoena may only be issued to service providers described in subsection (c) -- in other words, "to [those] service providers who have stored offending material on their own system or network." *Id.* at p. 3. Verizon notes that, in contrast, "subsection (a) -- the provision of section 512 for service providers acting simply as passive transmitters, as Verizon was here -- contains no provision for any notification of claimed infringers, much less notification that 'satisfies the requirements of (c)(3)(A).'" *Id.* Thus, Verizon reasons,

RIAA's subpoena to it is invalid because Verizon is not storing the infringing material on its system or network, but is simply providing "Internet connectivity" or acting as a "passive conduit" under subsection (a), and hence need not comply with the notification requirement in subsection (c)(3)(A).

The Court disagrees with Verizon's strained reading of the Act, which disregards entirely the clear definitional language of subsection (k). The holistic character of statutory construction requires an examination of all relevant text, and of language as well as structure. *See Connecticut Nat'l Bank*, 503 U.S. at 254, 112 S. Ct. 1146. Not only the language but also the structure of the DMCA dispenses with the contentions advanced by Verizon.

Verizon contends that the Court should infer that the subpoena authority under subsection (h) only applies to subsection (c) in light of the reference in subsection (h)(2)(A) to the notification requirement of subsection (c)(3)(A). But that reference does not mean that subsection (h) only applies to service providers described in subsection (c). In fact, the notification provision in subsection (c) is also referenced elsewhere in the DMCA, including in subsections (b)(2)(E) and (d)(3). The latter references confirm the expectation that notifications like that described in subsection (c)(3) will at times be needed in settings under subsections (b) and (d), and hence are not confined to subsection (c) settings. Subsection (h), moreover, is written without limitation or restriction as to its application. It is entitled "Subpoena to identify infringer" – not "Subpoena to identify infringer storing copyrighted material on a service provider's network" or "Subpoena to identify infringer relating to subsection (c)" If Congress intended to restrict or limit the subsection (h) subpoena authority based on where the infringing material resides, one would expect to see that

limitation spelled out in subsection (h). And if Congress intended to limit subsection (h) subpoenas strictly to service providers under subsection (c), it certainly could have made such a limitation explicit.

There is simply nothing in the text of the statute that states, or even suggests, that the subpoena authority in subsection (h) applies only to those service providers described in subsection (c). Indeed, subsection (h) does not require, as Verizon contends, a copyright owner to comply fully with subsection (c)(3)(A). The references in subsection (h) to "a notification described in" (*see* §§ 512(h)(2)(A) & (h)(5)) or that "satisfies the provisions of" (*see* § 512(h)(4)) subsection (c)(3)(A) do not by their language limit the subpoena authority. Rather, these references are consistent with the construction that when a subpoena under subsection (h) is sought against a service provider falling within subsections (a), (b) or (d), the copyright owner or authorized person must then provide a notification like the one always required under subsection (c) but not otherwise required under (a), (b) or (d). Thus, as part of the process to obtain a subpoena, subsection (h)(2)(A) simply requires a copyright owner to file with the clerk the type of "notification described in subsection (c)(3)(A)."

Significantly, then, if Congress had intended subsection (h) subpoenas to apply solely to subsection (c) service providers, it could have stated such a limitation in subsection (h), or stated that subsection (h) does not apply to subsections (a), (b) or (d), or even have placed the subpoena authority itself within subsection (c). But Congress did not do so. Instead, the subpoena authority in the DMCA is contained in a stand-alone subsection, just as separate from

subsection (c) as it is from subsections (a), (b), and (d).[5] It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000).

Verizon's proposed construction does not comport with other aspects of the Act either. A court must consider "the particular statutory language at issue, as well as the

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[5] Verizon also points out that under subsection (c)(3)(A)(iii) a copyright owner must identify the infringing material "that is to be removed or access to which is to be disabled." In order to remove or disable access to the material, Verizon argues, the material must be stored on its system -- an indication that Congress intended subsection (h) to apply only to those service providers who store infringing material on their systems. The Court is not persuaded. To begin with, a subpoena issued pursuant to subsection (h) is used to identify the infringer, not to force the service provider to remove material or disable access to it. The requirement for the notification is simply that it identify the infringing material to be removed, not that removal be effectuated. In addition, a copyright owner can meet the requirement under subsection (c)(3)(A)(iii) if it can disable access to material. Here, Verizon certainly can disable access to the material by terminating the account altogether. Verizon makes clear to customers in its terms of service that the use of its network for copyright infringement is strictly forbidden, and can result in a variety of sanctions, including termination. In fact, the DMCA *requires* service providers, in order to obtain the various safe harbor protections, to implement "a policy that provides for termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." 17 U.S.C. § 512(*i*) (1)(A). Verizon counters that terminating service is too harsh, and may prevent other family members from having Internet service. But again, the requirement is only identification of infringing material, not actual removal or access denial. There is nothing, moreover, to prevent a family member from opening another account. In any event, it is irrelevant whether the service provider is able, or intends, to disable access to the material. *See id.* § 512(h)(5) ("service provider shall expeditiously disclose to the copyright owner . . . the information required by the subpoena, . . . regardless of whether the service provider responds to the notification").

language and design of the statute as a whole." *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988). There is no discernable reason why Congress would limit the subpoena authority under subsection (h) to subsection (c) service providers alone. To begin with, the burden on a service provider in identifying an apparent infringer is no different depending on which subsection of 512 is implicated.[6] Indeed, considering the four-part structure of the liability limitations under the DMCA, subsections (a) through (d) together with the subpoena authority under subsection (h) only "make sense in combination" if construed so that the subpoena authority extends to service providers in all four categories. *See Fausto*, 484 U.S. at 453, 108 S. Ct. 668; *Wilson*, 290 F.3d at 355. Otherwise, the statute would fail significantly to address many contexts in which a copyright owner needs to utilize the subpoena process in order to discern the identity of an apparent copyright infringer. And although Verizon has attempted to justify an exclusion of just subsection (a) service providers from the reach of the subpoena authority, the position advanced by Verizon logically supports confining the subpoena authority to subsection (c) service providers alone, whereas the statutory language and structure certainly provide no basis for differentiating service providers within subsection (a) from those within subsections (b) and (d) as to the scope of the subpoena power. Moreover, whatever rationale warrants

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[6] Arguably, the total burden on service providers may be heavier from subpoenas relating to subsection (a), as there may be more infringement occurring with subsection (a) service providers than with subsection (c) service providers. But in exchange for complying with subpoenas under subsection (h), service providers receive liability protection from any copyright infringement -- direct or vicarious -- by their users. Hence, any additional burden is offset by that protection, which, of course, is exactly the contemplation reflected in the structure of the DMCA.

distinguishing among subsections (a) through (d) for purposes of the safe harbor liability protections, there is no corresponding rationale for such distinctions regarding a subpoena power that entails merely identifying infringers.

Importantly, Verizon's construction does not square with Congress's express and repeated direction to make the subpoena process "expeditious." *See, e.g.*, 17 U.S.C. §§ 512(h)(3), (h)(4) & (h)(5) (subpoena shall require service provider to expeditiously disclose identity of infringer; clerk shall expeditiously issue subpoena; and service provider shall expeditiously disclose identity of infringer upon receipt of subpoena). The statute contemplates a rapid subpoena process designed quickly to identify apparent infringers and then curtail the infringement. The copyright holder, however, cannot readily determine whether its infringed material was stored on or merely transmitted across the service provider's system, and hence whether it faces a subsection (c) or subsection (a) situation. As a result, if the copyright owner could only utilize the subpoena process for subsection (c) service providers, it would have to establish at the outset that the service provider fell within subsection (c) in the particular case at hand. Hence, in many instances an initial contested factual issue would ensue in court with respect to where the material is stored, resulting in potentially lengthy delays in obtaining identifying information about the infringer. Such complication and delay hardly comports with the language peppered throughout subsection (h) indicating that the subpoena process should be "expeditious." In fact, there is an important reason why Congress required service providers to act promptly upon receipt of a subpoena to prevent further infringement -- "the ease with which digital works

can be copied and distributed worldwide virtually instantaneously." S. Rep. No. 105-190, at 8.[7]

Verizon's construction thus makes little sense from a policy standpoint. Verizon has provided no sound reason why Congress would enable a copyright owner to obtain identifying information from a service provider storing the infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system (or, indeed, from a service provider engaged in system caching under subsection (b) or providing information location tools under subsection (d)). After all, the information obtained simply permits the copyright owner to take steps directly with the infringer to prevent further infringement. It is unlikely, the Court concludes, that Congress would seek to protect copyright owners in only some of the settings addressed in the DMCA, but not in others.

In short, Verizon's position that the subpoena power in subsection (h) only applies to subsection (c) service providers, and not to subsection (a) (or for that matter to subsections (b) and (d)) service providers, would create a huge loophole in Congress's effort to prevent copyright infringement on the Internet. There is little doubt that the largest opportunity for copyright theft is through peer-to-peer ("P2P") software, as used by the alleged infringer here.

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[7] The consequence of delaying the receipt of information identifying an infringer was highlighted by *amicus curiae* Motion Picture Association of America. If Warner Brothers sought to obtain by subpoena information identifying an alleged infringer disseminating the latest Warner Brothers' movie release over the Internet, but needed first to establish that the movie was stored on the service provider's system, the movie could be distributed all over the world in the meantime, dramatically diminishing the value of the copyright.

One *amici* characterizes such P2P software as "the biggest revolution to happen on the Internet since the advent of email or the World Wide Web -- millions of individuals use P2P now, and the number is growing exponentially." Br. of *Amicus Curiae* U.S. Internet Service Provider Assoc. at p. 6. Even Verizon states that "more than 100 million copies of [KaZaA's] peer-to-peer file sharing software have been downloaded, and more than two million of its users are commonly online at any given time." Verizon Opp. at p. 8. Because peer-to-peer users most often swap materials over the Internet that are stored on their own computers -- not on the service providers' networks -- such activity is within subsection (a), not subsection (c). Thus, under Verizon's reading of the Act, a significant amount of potential copyright infringement would be shielded from the subpoena authority of the DMCA.[8] That would, in effect, give Internet copyright infringers shelter from the long arm of the DMCA subpoena power, and allow infringement to flourish. The Court can find nothing in the language or structure of the statute that suggests Congress intended the DMCA to protect only a very limited portion of copyrighted material on the Internet.

3. The Purpose and History of the DMCA

"The traditional tools [of statutory construction] include examination of the statute's text, legislative history, and

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[8] Verizon recognizes the extent of this resulting loophole. In addressing the burden on service providers if subsection (h) applied to subsection (a), Verizon conceded at oral argument that far more infringement occurs with subsection (a) service providers: "There are, under subsection (a), far greater number of uses, e-mail, for instance, is part of subsection (a). The whole Internet is potentially drawn into subsection (a)." Tr. of Hearing (Oct. 4, 2002) at p. 61. Indeed, as one District Court observed in construing an unrelated provision of the DMCA, "piracy of intellectual property has reached epidemic proportions." *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002).

structure, as well as its purpose." *Natural Resources Defense Council, Inc., v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000). Here, the text and structure of the DMCA are clear, as explained above, and "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. at 147- 48, 114 S. Ct. 655. Nonetheless, common sense suggests that an assessment of the subpoena authority under the DMCA may benefit from an understanding of the purpose and history of the legislation. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611 n. 4, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991).

Congress not only sought to limit the liability of service providers under the DMCA, but also intended to assist copyright owners in protecting their copyrights. The legislative history makes clear that in enacting the DMCA, Congress attempted to balance the liability protections for service providers with the need for broad protection of copyrights on the Internet.[9] The clear purpose of the DMCA, evident in its legislative history, confirms that the scope of the subsection (h) subpoena power extends to service providers within subsection (a) as well as subsection (c).

The dual purpose and balance of the DMCA has been recognized by the courts. The Fourth Circuit has explained that "[t]he DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider."

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[9] To the extent the statutory language in the DMCA is unclear, "the legislative history of the DMCA can be useful in fleshing out its meaning given the paucity of precedent interpreting the statute." *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 700 (D. Md. 2001).

ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001). Other courts note this balancing as well. "Congress was concerned with promoting electronic commerce while protecting the rights of copyright owners, particularly in the digital age where near exact copies of protected works can be made at virtually no cost and distributed instantaneously on a worldwide basis." *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1124 (N.D. Cal. 2002) (citing S. Rep. No. 105-190, at 8). In short, Congress sought "to protect against unlawful piracy and promote the development of electronic commerce and the availability of copyrighted material on the Internet." *Id.* at 1125.

Congress thus created tradeoffs within the DMCA: service providers would receive liability protections in exchange for assisting copyright owners in identifying and dealing with infringers who misuse the service providers' systems. At the same time, copyright owners would forgo pursuing service providers for the copyright infringement of their users, in exchange for assistance in identifying and acting against those infringers.

> Title II [of the DMCA] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.

S. Rep. No. 105-190, at 20. "[T]he Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet." H.R. Rep. No.

105- 551(II), at 21; *see also* H.R. Rep. No. 105-551(I), at 11 (noting that remedies "ensur[e] that it is possible for copyright owners to secure the cooperation of those with the capacity to prevent ongoing infringement").[10] In striking this balance, Congress was driven by the observation that unless copyright owners have the ability to protect their copyrights on the Internet, they will be less likely to make their works available online:

> Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy . . . [This legislation] will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of the American creative genius.

S. Rep. No. 105-190, at 8.

Congress also recognized that the Internet created unprecedented opportunities for copyright infringement, and sought to provide assistance to copyright owners in light of the technological developments surrounding the Internet:

> Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player

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[10] "The DMCA affects [service providers'] liability by insulating [providers] from liability as long as they comply with certain statutory requirements designed to facilitate content providers' efforts to protect their copyrighted material." A. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 99 Geo. L.J. 1833, 1881 (2000).

> piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials . . . Title II [of the DMCA] clarifies the liability faced by service providers who transmit potentially infringing material over their networks. In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.

S. Rep. No. 105-190, at 1-2. As Senator Leahy explained, "[t]he DMCA is a product of the Senate Judiciary Committee's recognition that ours is a time of unprecedented challenge to copyright protection . . . This bill is a well - balanced package of proposals that address the needs of creators, consumers and commerce in the digital age and well into the next century." *Id.* at 68.

Congress was concerned about the ability of copyright owners to protect their creative investments in light of rapid technological innovations on the Internet that make copyright theft easy, virtually instantaneous, and undetectable. Therefore, in exchange for the liability protections afforded to service providers in subsections (a) through (d) of the DMCA, Congress sought through subsection (h) to require service providers to assist copyright owners in identifying infringers using the service providers' systems. If, as Verizon contends, service providers only have such obligations when the infringing material is stored on their systems, then service providers falling within subsection (a) -- a large portion of those addressed by the DMCA -- would receive the liability protections of the Act without the corresponding obligation to assist copyright owners in identifying infringers. There is no logical

connection between the line Verizon seeks to draw and the objectives Congress sought to achieve through the DMCA. Verizon's reading would thus undermine the balance Congress established in the DMCA, and does not comport with the Act's purpose and history.[11] It is not for this Court to second-guess the compromises, negotiations, or even brokered deals that produced the DMCA; rather, the Court's role is to interpret the statute as enacted by Congress, and the clear language and structure of the DMCA must therefore control. *See Barnhart*, 534 U.S. at 460-61, 122 S. Ct. 941.

Complicating this assessment somewhat is the fact that two new technology developments underlying the issues in this case -- peer-to-peer (P2P) software and "bots," a software tool used by copyright owners to monitor the Internet and detect unauthorized distribution of copyrighted material -- were "not even a glimmer in anyone's eye when the DMCA was enacted" by Congress in 1998.[12] RIAA contends that P2P software makes Internet copyright piracy easy and immediate, while Verizon counters that "bots" will inundate service providers with thousands of computer-generated subpoenas seeking to identify infringers. Whether or not Congress was able to anticipate these technologies in enacting the DMCA, however, the courts cannot read new provisions or exceptions into a statute in order to accommodate future technological developments.

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[11] This balance was adopted with substantial input from the service providers. In fact, the large service providers, including AOL and others, were heavily involved in negotiating these tradeoffs in the legislation. "Title II, for example, reflects 3 months of negotiations supervised by Chairman Hatch and assisted by Senator Ashcroft among the major copyright owners and the major OSP's and [Internet Service Providers]." S. Rep. No. 105-190, at 9.

[12] Br. of *Amicus Curiae* Alliance for Public Technology, *et al.*, at p. 6.

Particularly in the field of copyright, federal courts must defer to Congress' expertise and constitutional authority.

The Constitution assigns to Congress the authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8. The Supreme Court has long deferred to Congress on the scope and nuances of copyright law, especially regarding new technologies:

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably complicated by such new technology.

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984); *see also Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 414, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974) ("Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in [the copyright] field, must be left to Congress."); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968) (Court refused "to render a compromise decision . . . [to] accommodate various competing considerations of copyright, communications, and antitrust policy. We decline that invitation. That job is for Congress."). As recently as last week, the Supreme Court reiterated that "we defer substantially to Congress" on copyright law, that "we are not at liberty to second-guess congressional determinations and policy judgments" regarding copyright

issues, and that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 772, 782, 785, 154 L. Ed. 2d 683 (2003) (citing *Sony Corp.*, 464 U.S. at 429, 104 S. Ct. 774, and *Stewart v. Abend*, 495 U.S. 207, 230, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990)).

Notwithstanding these technological advancements, then, this Court will not attempt to re-balance the competing interests among service providers and copyright holders to address P2P software or "bots" that can roam the Internet detecting infringing material. As the Supreme Court stated in *Fortnightly*, "[t]hat job is for Congress." 392 U.S. at 401, 88 S. Ct. 2084. To date, Congress has spoken through the text, structure and purpose of the DMCA, under which, the Court concludes, RIAA's subpoena to Verizon meets the requirements spelled out in subsection (h) and therefore is valid.[13]

4. "John Doe" Actions As an Alternative

Verizon maintains that under its construction of the DMCA, with the subsection (h) subpoena power limited to service providers under subsection (c), owners would still have an adequate means to protect their copyrights. Verizon suggests that as an alternative RIAA may bring a "John Doe" action in federal court to obtain information identifying copyright infringers who, under subsection (a) of the DMCA, transmit infringing material over a service

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[13] Verizon has not challenged RIAA's subpoena to Verizon on the ground that it does not meet the notification requirements under subsections (c)(3)(A) or (h)(2). RIAA provided a notification described in (c)(3)(A), including the identity of the copyright works infringed, a statement in good faith that the use of the works is not authorized, and a sworn declaration that the purpose of the subpoena is to obtain the identity of the infringer and that the information will only be used to protect rights to the copyright. *See* Motion to Enforce, Ex. B.

provider's network. As Verizon sees it, the copyright owner would file a complaint against John Doe, the unnamed infringer, and a third-party subpoena would then be issued and served on the service provider pursuant to Fed. R. Civ. P. 45. The service provider would then inform John Doe (its customer) of the lawsuit. Under this process, Verizon asserts, there would be protections, both procedural and substantive, for the user's rights, and service providers would have the opportunity to seek to quash the subpoena.

The short answer to Verizon's suggestion is that there is absolutely nothing in the DMCA or its history to indicate that Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers, rather than employing the subsection (h) process specifically designed by Congress to address that need. Moreover, as Verizon concedes, the burden on service providers is certainly no greater with a DMCA subpoena than with a Rule 45 third-party subpoena.

The additional burden on copyright owners, however, would be considerable, given the effort and expense associated with pursuing such John Doe suits in court. Congress has noted the vast extent of copyright piracy over the Internet, and growing numbers of suits involving disputes over the sufficiency of allegations of infringement and other issues would, in turn, likely undermine the determination of copyright owners to prosecute such actions. Importantly, the time and delay associated with filing complaints and pursuing third-party subpoenas in court would undermine the ability of copyright owners to act quickly to prevent further infringement of their copyrights. That is at odds with the design of Congress through the DMCA, which commands "expeditious" issuance of and response to subpoenas under subsection (h). Moreover, Verizon overlooks altogether the burden on the

federal courts from large numbers of such actions. Federal courts have exclusive jurisdiction over copyright actions, and considering the extent of Internet copyright piracy could become inundated with John Doe actions seeking the identity of copyright infringers. *See NBC, Inc. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1295 (D.C. Cir. 1988) ("the federal courts . . . have exclusive jurisdiction over actions 'arising under' the Copyright Act, such as infringement actions"). Undoubtedly, the John Doe actions contemplated by Verizon would be more complex (involving three-party litigation) and time consuming than occasional enforcement actions for DMCA subpoenas.

Not only are John Doe actions more burdensome and less timely, but in several important ways they are less protective of the rights of service providers and Internet users than is the section 512(h) process. The DMCA mandates that a copyright holder fulfill several requirements under subsection (h) before the holder can obtain information from the service provider identifying the infringer. These protections ensure that a service provider will not be forced to disclose its customer's identifying information without a reasonable showing that there has been copyright infringement. Thus, to obtain a subsection (h) subpoena a copyright owner must have a "good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law," § 512(c)(3)(A)(v), and must provide a "statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed," § 512(c)(3)(A)(vi). Moreover, Congress required a copyright owner to submit

> a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the

> identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

17 U.S.C. § 512(h)(2)(c). These requirements provide substantial protection to service providers and their customers against overly aggressive copyright owners and unwarranted subpoenas. Indeed, they provide greater threshold protection against issuance of an unsupported subpoena than is available in the context of a John Doe action. And, of course, nothing in the DMCA precludes a service provider from raising non-compliance or other objections to a subsection (h) subpoena. *See, e.g., ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) (action addressing service provider's resistance to subpoena for non-compliance with the DMCA).[14]

Given these various protections incorporated into the DMCA subpoena process,[15] the Court concludes that

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[14] The DMCA also provides disincentives for false representations under the Act, making it costly for anyone to seek a subpoena on the basis of intentional misrepresentations, and thereby further ensuring that subpoenas will only be used in circumstances of good faith allegations of copyright infringement. Subsection (f) of the Act provides:

> Misrepresentations – Any person who knowingly materially misrepresents under this section (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer . . . or by a service provider, who is injured by such misrepresentations, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing . . ..

17 U.S.C. § 512(f).

[15] Indeed, the requirements for obtaining a section 512(h) subpoena are precisely the type of procedural requirements that other courts have imposed for subpoenas on service providers to identify anonymous posters of messages on the Internet. *See Doe v. 2TheMart.Com. Inc.*, 140 F.

Verizon's suggestion that John Doe actions are an adequate alternative remedy is not convincing. There is nothing in the DMCA to indicate that Congress intended that result. Such actions would be unworkable, far too slow, and uneconomical for copyright holders, and much too burdensome for the federal courts. Congress did not, in the Court's view, contemplate some service providers subject to the DMCA facing expeditious subsection (h) subpoenas, while others would only have to provide information identifying infringers through the slower, more cumbersome process of a John Doe action. Indeed, Verizon's suggestion would mean subpoenas under subsection (h) -- if limited to subsection (c) service providers -- would be delayed by complex factual issues involving whether a subsection (c) setting was actually presented, while subpoenas to all other service providers would be pursuant to even more burdensome, and slower, John Doe actions. Such a cumbersome, dual structure is flatly inconsistent with the "expeditious" subsection (h) subpoena process, and would run a serious risk of dissuading copyright owners from seeking the identity of apparent infringers and protecting their copyrights.[16] That result would be contrary to Congressional intent as evidenced in the text, structure and history of the DMCA.

Supp. 2d 1088, 1095 (W.D. Wash. 2001) (party seeking subpoena to service provider to identify anonymous non-party must show subpoena sought in "good faith" and that identifying information sought is directly and materially relevant to core claim and unavailable from any other source); *see also Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578-79 (N.D. Cal. 1999).

[16] When the Court asked Verizon's counsel whether John Doe actions might be so expensive that they would "scare off" copyright owners, he responded that "[t]here is that possibility" given the protections and "hoops that have to be gone through under the John Doe suits." Tr. of Hearing (Oct. 4, 2002) at p. 62.

5. The DMCA and the Constitution

A number of possible constitutional challenges to the subsection (h) subpoena power have been identified by *amici curiae*. Verizon, however, does not assert that the subpoena power in subsection (h), as applied to service providers (like Verizon) under subsection (a), is unconstitutional; instead, Verizon merely states that it "raises substantial questions."[17] RIAA accordingly has not fully briefed the various constitutional issues raised by the *amici curiae* supporting Verizon. Hence, the Court is without the benefit of full development of these issues by the parties.

Unless raised by the parties, a court normally should not entertain statutory or constitutional challenges asserted solely by *amici*. *See, e.g., A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 266 (3d Cir. 2001) ("Although the Cato Institute, *amicus curiae* for plaintiffs, argues constitutional claims, new issues raised by an *amicus* are not properly before the court in the absence of exceptional circumstances.") (quoting *General Eng'g Corp. v. Virgin Islands Water and Power Auth.*, 805 F.2d 88, 92 (3d Cir. 1986)). Indeed, in construing the DMCA, the Second Circuit refused to consider a constitutional challenge briefly addressed by the defendant in a footnote, although fully examined by an *amicus*. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001). Without a "properly developed record," the court found that the defendant effectively waived the constitutional challenge: "Although an *amicus* brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues

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[17] Verizon devotes only two sentences and a footnote to the constitutional issues, contending that the subsection (h) subpoena authority, if broadly construed, raises substantial Article III (judicial power) and First Amendment (freedom to engage in anonymous speech) questions. *See* Verizon Opp. at p. 4.

..., at least in cases where the parties are competently represented by counsel." *Id.* at 445. Here, because Verizon is not raising any explicit constitutional challenge to the DMCA, the Court is wary of considering such issues.[18]

Even if the Court were to consider a constitutional challenge here, it must be noted that any constitutional problems faced by service providers or their customers would exist under Verizon's construction of the DMCA as well. The Court's authority and users' anonymity are equally at issue with subsection (c) as with subsection (a), and the First Amendment interest -- the identity of the user -- is identical no matter which subsection is invoked.

It is also clear that the First Amendment does not protect copyright infringement. *See Harper & Row, Publs., Inc. v. Nation Enters.*, 471 U.S. 539, 555-60, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); *Zacchini v. Scripps- Howard*, 433 U.S. 562, 574-78, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). Moreover, the Supreme Court recently confirmed in *Eldred v. Ashcroft* that the proximity of the Copyright Clause and the First Amendment demonstrates "the Framers' view [that] copyright's limited monopolies are compatible with free speech principles," and that copyright serves to promote First Amendment ideals as "'the engine of free expression.'" 123 S. Ct. at 788 (quoting *Harper & Row*, 471 U.S. at 558, 105 S. Ct. 2218). The Court noted "built-in First Amendment accommodations" in copyright law, including the distinction between ideas and expression and the "fair use" doctrine, which it found "are generally adequate to address" First Amendment concerns relating to asserted rights to use the speech of others. *Id.* at 788-89; *see Nihon Keizai Shimbun, Inc.*

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[18] RIAA and Verizon have acknowledged that Verizon may not have standing to raise a challenge to the subpoena based on the user's alleged First Amendment or other constitutional interests. The Court need not address that issue here.

v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."). Here, of course, the various protections incorporated into subsection (h), and discussed *supra*, further guard against First Amendment concerns.

Nor is this an instance where the anonymity of an Internet user merits free speech and privacy protections. Certainly, the Supreme Court has recognized that, in some situations, the First Amendment protects a speaker's anonymity. *See, e.g., Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080, 2090, 153 L. Ed. 2d 205 (2002) (municipal ordinance requiring pamphleteers to disclose names implicates "anonymity interests" rooted in the First Amendment); *Buckley v. Am. Constitutional Law Foun., Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (state requirement forcing petitioners to wear identification badge violated First Amendment because it infringed on petitioners' anonymity); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (the right to speak anonymously "exemplifies the purpose behind the Bill of Rights, and the First Amendment in particular"). Lower federal courts have specifically recognized that the First Amendment may protect an individual's anonymity on the Internet. *See, e.g., Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d at 1097 ("the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded"); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (upholding First Amendment right to communicate anonymously over the Internet); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997) (recognizing constitutional right to communicate anonymously and

pseudonymously on the Internet). The Internet and Worldwide Web provide an unprecedented electronic megaphone for the expression of ideas and an unparalleled opportunity for a national--even international--town square for expression. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 853, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.").

But neither Verizon nor any *amici* has suggested that anonymously offering for downloading more than 600 songs over the Internet without authorization is protected expression under the First Amendment.[19] To be sure, this is not a case where Verizon's customer is anonymously using the Internet to distribute speeches of Lenin, Biblical passages, educational materials, or criticisms of the government--situations in which assertions of First Amendment rights more plausibly could be made. As the Supreme Court explained in *Watchtower Bible & Tract Society*, the purpose of protecting anonymous expression is to safeguard those "who support causes anonymously" and those who "fear economic or official retaliation," "social ostracism," or an unwanted intrusion into "privacy." 122 S. Ct. at 2089. The materials RIAA alleges are being infringed include more than 600 copyrighted recordings by well-known artists. RIAA has shown that the copyright owners have not authorized such use; moreover, the fact that these copyrighted materials were shared over the peer-to-peer software of KaZaA only reinforces the belief that copyrights are being infringed. There is no evidence, or even suggestion, in the record to indicate that downloading or

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[19] RIAA notes, moreover, that the alleged infringer is not truly anonymous--Verizon knows the identity.

transmitting these recordings is somehow protected expression.[20]

Interestingly, Verizon's argument that a copyright owner seeking to obtain information about an alleged infringer should use a John Doe action undercuts the contention that the DMCA subpoena process violates the Internet user's right to anonymity. The First Amendment problems, if any, would be the same in either litigation setting, and the user could assert its rights and objections to either subpoena.[21] Hence, if the John Doe action alternative poses no First

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[20] The Ninth Circuit has twice upheld injunctions ordering a defendant to disable its file transferring service and shut down the service, without finding any First Amendment violation. *See A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("First Amendment concerns in copyright are allayed by the presence of the fair use doctrine" and "[u]ses of copyrighted material that are not fair uses are rightfully enjoined"). This Court, however, is not being asked to enjoin the peer-to-peer software used here; litigation against KaZaA is proceeding in other courts across the country. All that is at issue here is the identity of the apparent infringer using Verizon's system, and whether the DMCA requires Verizon to produce that limited information.

[21] The *amici* also challenge the subsection (h) subpoena power on the ground that under Article III of the Constitution there must be a "case or controversy" before the Court to provide jurisdiction to issue a subpoena. Again, Verizon has made it clear that it is not raising an Article III challenge to the DMCA, but only noting a "policy consideration" relevant in interpreting the DMCA, and there has been no briefing on this issue by the parties. *See* Tr. of Hearing (Oct. 4, 2002) at p. 61. Of course, the DMCA includes a provision in subsection (h)(6) requiring that the issuance and enforcement of subpoenas "shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum." That protection ensures that service providers served with subpoenas can resort to the Federal Rules, including Fed. R. Civ. P. 45, which specifically addresses subpoena enforcement and the rules for quashing a subpoena.

Amendment issue, the subsection (h) subpoena process does not either.

The Court does not, however, resolve the constitutional issues identified by Verizon and several *amici*. Absent a clear challenge by Verizon, and full briefing and development by the parties, it is not appropriate to do so. But certainly the issues raised do not reveal an obviously fatal constitutional flaw in the subpoena process available under the DMCA.[22]

CONCLUSION

Based on the text and structure of the Digital Millennium Copyright Act, as confirmed by the purpose and history of the Act, the Court concludes that the subpoena authority of section 512(h) applies to all service providers within the coverage of the Act, including Verizon and other service providers falling within subsection (a). With copyright legislation such as the DMCA, "[t]he wisdom of Congress' action . . . is not within [the Court's] province to second guess." *Eldred v. Ashcroft*, at 790. Therefore, the Court grants RIAA's motion to enforce its subpoena, and orders Verizon to comply with the subpoena. A separate order has been issued on this date.

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[22] Arguably, a First Amendment challenge by Verizon would be facial rather than as applied, and thus it would have to be shown that in virtually every application the DMCA offends the First Amendment by requiring the production of the identity of an anonymous user. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). That is a heavy burden for Verizon to satisfy.

Appendix C

United States District Court,
District of Columbia.

In re: VERIZON INTERNET SERVICES, INC.,
Subpoena Enforcement Matter,
Recording Industry Association of America, Plaintiff,
v.
Verizon Internet Services, Defendant.

No. CIV.A. 03-MS-0040 JDB.

April 24, 2003.

MEMORANDUM OPINION

BATES, District Judge.

Before the Court is the motion of Verizon Internet Services ("Verizon") to quash the February 4, 2003 subpoena served on it by the Recording Industry Association of America ("RIAA") pursuant to the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 512. On behalf of copyright owners, RIAA seeks the identity of an anonymous user of the conduit functions of Verizon's Internet service who is alleged to have infringed copyrights by offering hundreds of songs for downloading over the Internet.[1] In an earlier action, this Court rejected Verizon's statutory challenges to a similar subpoena, holding that Verizon's conduit functions were within the scope of the subpoena authority of § 512(h) of the DMCA. *See In re:*

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[1] RIAA is the industry trade association for sound and music recordings, and is authorized to enforce the copyrights of its members, who create and distribute most of the music sold in the United States.

Verizon Internet Services, Inc., Subpeona Enforcement Matter, 240 F. Supp. 2d 24 (D.D.C. 2003). Verizon now claims that § 512(h) violates Article III of the Constitution because it authorizes federal courts to issue binding process in the absence of a pending case or controversy, and that § 512(h) violates the First Amendment rights of Internet users. If the merits of Verizon's constitutional challenges are rejected by this Court, Verizon seeks a stay pending appeal of that ruling, and of the earlier statutory ruling by this Court.

Having considered the parties' several memoranda, three hearings, the brief of the United States as intervenor defending the constitutionality of § 512(h), a number of *amicus* briefs, and the entire record herein, the Court denies Verizon's motion to quash RIAA's February 4, 2003 subpoena. The subpoena power authorized under § 512(h) of the DMCA does not violate the case or controversy requirement of Article III and does not abridge the First Amendment rights of Internet users. Moreover, because Verizon is unable to show irreparable harm or that it is likely to succeed on an appeal of its constitutional or statutory challenges, the Court also denies Verizon's request for a stay pending appeal.[2]

I. PROCEDURAL HISTORY

This case has followed a somewhat circuitous procedural path. To begin with, this is the second subpoena RIAA has served on Verizon pursuant to the DMCA seeking the identity of an anonymous Internet user alleged to have infringed protected copyrights. On July 24, 2002, RIAA served its first subpoena to obtain the identity of a Verizon subscriber alleged to have made more than 600 copyrighted songs available for downloading over the Internet through

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[2] A temporary stay of 14 days will be entered to enable Verizon to seek a stay in the Court of Appeals.

peer-to- peer file transfer software provided by KaZaA. Verizon claimed that because RIAA's subpoena related to material transmitted over Verizon's network -- rather than stored on it -- it fell outside the scope of the subpoena power authorized by § 512(h). Verizon read § 512(h) as applying only in those situations where the infringing material is physically stored on the service provider's network. RIAA contended that the subpoena authority under § 512(h) applied to all service providers under the DMCA, including Verizon. The parties framed the issue as one of statutory construction, although Verizon noted that if § 512(h)'s subpoena authority were construed as applying to all service providers, the statute "raises substantial questions" under Article III and the First Amendment.

The Court construed the subpoena power in § 512(h) as applying to all service providers under the DMCA, and granted RIAA's motion to enforce the subpoena. *See In re: Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (hereinafter "*First Subpoena Decision*"). The Court did not reach the constitutional arguments, instead deciding the question strictly on statutory grounds by construing the DMCA's language, structure, purpose, and legislative history. As a result, the Court found the subpoena valid and ordered Verizon expeditiously to provide RIAA with the identity of the subscriber alleged to be infringing copyrighted songs.

Verizon appealed that decision, and moved to stay the Court's order pending resolution of its appeal.[3] In its motion for a stay, Verizon asserted constitutional challenges as the primary basis for a stay, claiming that the Court's construction of § 512(h) raised serious questions regarding the First Amendment rights of Internet users and presented

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[3] Pursuant to Fed. R. App. P. 8(a), this Court ordered a temporary stay to allow the issues to be fully briefed and decided.

a critical issue whether a subpoena could issue under Article III without an actual "case or controversy" pending in federal court. RIAA contended that because Verizon had not raised these issues earlier, it had waived them on appeal.

The Court held a hearing on Verizon's stay motion. Meanwhile, however, RIAA served a *second* subpoena on Verizon on February 4, 2003. Shortly after the hearing on its motion to stay the first subpoena, Verizon moved to quash RIAA's second subpoena, directly presenting the constitutional challenges.[4] In an effort to resolve both the motion to stay on the first subpoena and the constitutional challenges to the second subpoena, the Court ordered another round of expedited briefing. Verizon proposed notifying the two subscribers whose conduct is at issue of the commencement and status of these actions, and the nature of RIAA's allegations of copyright infringement, which was then done at the Court's urging. A third hearing to address Verizon's constitutional challenges to § 512(h) was held on April 1, 2003. Subsequently, the United States has moved, and been permitted, to intervene and has submitted a brief defending the constitutionality of the DMCA.

The gravamen of Verizon's statutory challenge to the first subpoena was that the subpoena power under § 512(h) should be construed as limited to situations within § 512(c) where allegedly infringing material is stored on the Internet service provider's network. This Court firmly rejected that view in *First Subpoena Decision*, 240 F. Supp. 2d 24. The constitutional challenges now asserted by Verizon in response to the second RIAA subpoena are, although

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[4] Because the second subpoena involved the same parties as the first subpoena and related legal issues, Verizon's motion to quash was assigned to this judge with the agreement of both Verizon and RIAA.

substantive and in apparent good faith, somewhat in tension with the earlier statutory challenge. If Verizon were correct that § 512(h) should be construed to permit subpoenas only for subsection (c) service providers -- which it is not -- Verizon's Article III challenge would nonetheless retain its full force because such subpoenas would still, under Verizon's view, be unconnected to a pending case or controversy, and the asserted First Amendment concerns would also remain, albeit focused on the more limited subset of subscribers of subsection (c) service providers. Given this tension, one might ask why the constitutional challenges were not more fully pressed by Verizon in the first subpoena litigation. Be that as it may, those issues are now squarely before the Court in this case.[5]

II. SECTION 512(h) DOES NOT VIOLATE ARTICLE III

Verizon contends that § 512(h) violates Article III of the Constitution because it authorizes federal courts to issue subpoenas in the absence of a pending case or controversy. Citing cases from the eighteenth and nineteenth centuries, Verizon argues that federal judges can neither exercise authority outside the context of an actual case or controversy nor undertake non-judicial functions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L. Ed. 436 (1792); *United States v. Ferreira*, 54 U.S. 40, 13 How. 40, 14 L. Ed. 40 (1851). Relying on *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988), and *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996), Verizon also argues more specifically that "the power to issue subpoenas exists only in the context of a case that is properly pending before

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[5] Because the *First Subpoena Decision* provided an extensive overview of § 512 of the DMCA, the Court will not repeat that explanation here, and instead incorporates that background discussion by reference.

a federal court." Verizon's Br. Supp. Mot. Quash Feb. 4, 2003 Subpoena at 12.[6]

Verizon's arguments, although intriguing, are ultimately not persuasive. No doubt the justices of the Supreme Court have indicated that the federal courts are properly confined to the exercise of "judicial power." *See Hayburn's Case*, 2 U.S. at 410 n.*, 2 Dall. 409; *Ferreira*, 54 U.S. at 48, 13 How. 40.[7] And, more recently, the Supreme Court has noted that "[f]ederal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends." *United States v. Morton Salt Co.*, 338 U.S. 632, 641-642, 70 S. Ct. 357, 94 L. Ed. 401 (1950). But upon examination, it is clear that the § 512(h) subpoena authorization does not represent an innovation that is inconsistent with the limited role of the judiciary as it has traditionally been understood in our constitutional regime.

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[6] To be clear, Verizon does not contend that the instant proceeding to quash a subpoena is not a case or controversy; rather, Verizon contends that the issuance of the subpoena under § 512(h) does not constitute, and was not conducted in the context of, a case or controversy. It is well-established that courts may hear an action to enforce or quash a subpoena even where the subpoena was not issued in connection with a case pending in the federal courts. *See ICC v. Brimson*, 154 U.S. 447, 490, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894) (courts may aid inquiries before the ICC); *United States v. Hill*, 694 F.2d 258, 269 (D.C. Cir. 1982) (court has jurisdiction to enforce investigatory subpoenas issued by the Department of Energy).

[7] The Supreme Court itself did not reach the constitutional issue in *Hayburn's Case*, but the opinions of several Circuit Courts (on which certain Justices of the Supreme Court sat) "were reported in the margins of the Court's decision in that case, and have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison v. Olson*, 487 U.S. 654, 678 n. 15, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

As an initial matter, the clerk's issuance of a § 512(h) subpoena does not involve either the exercise of judicial power or the exercise by federal judges of Article I or Article II-type investigatory power. Indeed, the issuance of a § 512(h) subpoena cannot properly be considered an act of "the court." Subsection (h)(4) provides that "[i]f the notification [of claimed infringement] filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk **shall** expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider." 17 U.S.C. § 512(h)(4) (emphasis added). Under this subsection, the clerk exercises no discretion; if the requirements are met, the subpoena must be issued. The clerk, in other words, executes a quintessentially ministerial duty. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498, 18 L. Ed. 437 (1866) ("A ministerial duty ... is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."); *Nealon v. Davis*, 18 F.2d 175, 176 (D.C. Cir. 1927) ("A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of his own judgment upon the propriety of the act being done." (citation and internal quotation marks omitted)). In fact, the legislative history of § 512(h) indicates that Congress specifically intended the issuance of the subpoena to "be a ministerial function." S. Rep. No. 105-190, at 51 (1998).

Stretching back to the days of Chief Justice Marshall, the Supreme Court has repeatedly distinguished between actions that are ministerial in nature and those that constitute an exercise of judicial, legislative, or discretionary executive power. *See, e.g., Custiss v. Georgetown & Alexandria*

Turnpike Co., 6 Cranch 233, 10 U.S. 233, 237, 3 L. Ed. 209 (1810) (Marshall, C.J.) (clerk's act of recording an inquisition signed by marshal and jurymen is a "ministerial act which the law directs the clerk to perform ... and requires no exercise of judicial functions"); *Elliot v. Lessee of William Peirsol*, 26 U.S. 328, 341, 1 Pet. 328, 7 L. Ed. 164 (1828) (in making and recording a certificate of acknowledgment of a deed, clerk of court "acted ministerially, and not judicially"); *Ex parte Virginia*, 100 U.S. 339, 348, 10 Otto 339, 25 L. Ed. 676 (1879) (selection of jurors "surely is not a judicial act" but "is merely a ministerial act"); *Central Loan & Trust Co. v. Campbell Comm'n Co.*, 173 U.S. 84, 95, 19 S. Ct. 346, 43 L. Ed. 623 (1899) (probate judge's grant of an order for attachment did "not involve the discharge of a judicial function but merely the performance of a ministerial duty"); *ICC v. Chicago Great W. Ry. Co.*, 209 U.S. 108, 117-18, 28 S. Ct. 493, 52 L. Ed. 705 (1908) (positing distinction between duties that are "ministerial, and therefore such as may legally be imposed upon a ministerial body" and those that are "legislative, and therefore, under the Federal Constitution, a matter for congressional action"); *Wells v. Roper*, 246 U.S. 335, 338, 38 S. Ct. 317, 62 L. Ed. 755 (1918) (decision by Postmaster General and his deputy to cancel contract "was executive in character, not ministerial, and required an exercise of official discretion"); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 479, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) (District of Columbia Court of Appeals acted judicially, not ministerially, in considering petitions for waiver of bar admission requirements).[8] Chief Justice Marshall specifically noted in *Custiss* that "the legislature

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[8] *See also Dornan v. Sanchez*, 978 F. Supp. 1315, 1326 (C.D. Cal. 1997) (court's issuance of subpoenas in connection with election contest to be adjudicated by House of Representatives is a "ministerial" function that does not require the court to "exercise its own judicial power").

may direct the clerk of a court to perform a specified service, without making his act the act of the court." 10 U.S. at 236, 6 Cranch 233.

Here, the fact that Congress has directed an employee of the judicial branch to carry out a specific non-discretionary function neither implicates Article III judicial power nor involves federal judges in an investigation of the sort properly relegated to one of the other branches. In a real-world sense, no Article III judge takes any action with respect to a § 512(h) subpoena until the copyright holder moves to enforce the subpoena or the service provider moves to quash it--at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution.

Verizon objects to this line of analysis, arguing that a § 512(h) subpoena is issued in the name of the district court and thus should be treated as an act of the court. And, indeed, it is true that because the procedures in Fed.R.Civ.P. 45 governing enforcement of a subpoena *duces tecum* are applicable to a § 512(h) subpoena, *see* 17 U.S.C. § 512(h)(6), a service provider's failure to comply with a § 512(h) subpoena could, like a failure to comply with a Rule 45 subpoena, be construed as a violation of a court order, providing a basis for contempt sanctions. *See Waste Conversion, Inc. v. Rollins Envtl. Servs. (NJ). Inc.*, 893 F.2d 605, 608 (3d Cir. 1990) (en banc) (assuming "for purposes of this appeal," that failure to comply with a Rule 45 subpoena for testimony could subject a person to criminal contempt); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir. 1975) ("A subpoena is a lawfully issued mandate of the court issued by the clerk thereof."); Fed. R. Civ. P. 45 advisory committee notes for 1991 amendment ("Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless

an act in defiance of a court order and exposes the defiant witness to contempt sanctions."). But even in the Rule 45 context, courts recognize that a subpoena issued upon express order of a judge and a subpoena issued by the clerk of the court are not equivalent. *See Waste Conversion*, 893 F.2d at 608 ("A subpoena, obtainable as of course from the Clerk of the Court, is not of the same order as one issued by a judicial officer in the resolution of a specific dispute."); *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1364 (2d Cir. 1991) (same); Fed. R. Civ. P. 45 advisory committee notes for 1991 amendment ("But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the nonparty witness has been overborne by a party or attorney."); *see also Doe v. DiGenova*, 779 F.2d 74, 85 (D.C. Cir. 1985) (grand jury subpoena is not an "order of a court" unless specifically approved by a court). The better view here is that because the issuance of a § 512(h) subpoena is a ministerial task accomplished without judicial involvement, it does not implicate Article III judicial power or improperly place federal judges in an investigatory role.

In any event, assuming that the issuance of a § 512(h) subpoena can be conceptualized as a judicial act, Verizon's challenge still fails. In the first place, § 512(h) is by no means as unique as Verizon claims. Congress has enacted several provisions that specifically authorize the clerk of the district court to issue subpoenas despite the absence of a pending case or controversy in the federal courts. *See, e.g.*, 2 U.S.C. § 388 (subpoenas for depositions in connection with proceedings in the House of Representatives); 35 U.S.C. § 24 (subpoenas for evidence to be used in connection with proceedings in Patent and Trademark Office); 45 U.S.C. § 157(h) (subpoenas at the request of arbitrators under the Railway Labor Act); 7 U.S.C. § 2354(a) (subpoenas for evidence to be used in connection with proceedings in Plant

Variety Protection Office). Moreover, these provisions are not recent innovations but rather were firmly established by the time that § 512(h) was enacted in 1998. *See Dornan*, 978 F. Supp. at 1319 (noting that precursor to 2 U.S.C. § 388 was enacted in 1798); Act of July 8, 1870, ch. 230, § 44, 16 Stat. 204 (original source of 35 U.S.C. § 24); Railway Labor Act, ch. 347, § 7, 44 Stat. 577 (1926) (original source of 45 U.S.C. § 157(h)); Pub.L. 91-577, tit. I, § 24, 84 Stat. 1544 (1970) (original source of 7 U.S.C. § 2354(a)).

But even setting aside these particular provisions, it is clear that "federal courts and judges have long performed a variety of functions that . . . do not necessarily or directly involve adversarial proceedings within a trial or appellate court." *Morrison*, 487 U.S. at 681 n. 20, 108 S. Ct. 2597; *see also United States v. Reagan*, 453 F.2d 165, 173 n.4 (6th Cir. 1971) ("The invocation of judicial power prior to formal charges being made or before filing suit is indeed a common practice in our jurisprudence."). In the criminal context, for example, courts issue warrants, *see* Fed. R. Crim. P. 41, and review applications for wire taps, *see* 18 U.S.C. §§ 2516, 2518, "both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence submitted in an *ex parte* proceeding." *Morrison*, 487 U.S. at 681 n.20, 108 S. Ct. 2597. Courts also assist grand juries in their investigative function by compelling the testimony of witnesses, despite the absence of a traditional adversarial proceeding. *See id.*[9] And Congress has authorized district

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[9] Verizon baldly asserts that the § 512(h) subpoena context cannot "be analogized to the textually assigned judicial roles of checking Executive power in grand jury investigations and applications for search warrants." *See* Verizon's Reply Br. Supp. Mot. Quash at 2 n.3 (citing U.S. Const. amends. IV & V). But the proposition that in these settings courts serve to check Executive power does not undermine the overarching fact that the Constitution acknowledges roles for the judiciary outside the context of a classic case or controversy.

courts to require testimony or other evidence for use in a foreign tribunal, even where no proceeding is yet pending in that forum. *See* 28 U.S.C. § 1782(a); *In re: Letter Rogatory*, 42 F.3d 308, 310 (5th Cir. 1995) ("Congress abrogated the requirement that the foreign litigation actually be pending before relief could be had under § 1782.").[10]

In the civil context, perhaps the most deeply rooted analogue to § 512(h) is Fed. R. Civ. P. 27(a). That provision reflects the traditional powers of the courts at equity dating from even before the adoption of the Constitution, *see Arizona v. California*, 292 U.S. 341, 347, 54 S. Ct. 735, 78 L. Ed. 1298 (1934), and allows a federal court to authorize a person to perpetuate testimony by deposition before an action is filed where doing so would "prevent a failure or delay of justice." Fed. R. Civ. P. 27(a)(3). In order to obtain a Rule 27(a) order, the petitioner seeking testimony must show

> 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.

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[10] Moreover, as the United States points out, in the § 1782 setting it is unlikely there will ever be an underlying claim within federal court jurisdiction because the proceeding in the foreign tribunal arises under foreign, not American, law. *See* Br. Intervenor United States at 8.

Fed. R. Civ. P. 27(a)(1).

Notably, the requirements for obtaining a § 512(h) subpoena are similarly rigorous. A copyright owner (or a person authorized to act on the owner's behalf) must present to the clerk a proposed subpoena, "a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under [Title 17]," and a copy of the notification of claimed infringement. 17 U.S.C. § 512(h)(1), (2). This notification, in turn, must include "substantially the following":

> (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
>
> (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
>
> (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
>
> (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

> (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
>
> (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Id. § 512(c)(3). Thus, under both Rule 27(a) and § 512(h), private parties may avail themselves of judicial machinery to obtain information prior to the filing of a complaint -- but only if they satisfy a specific set of criteria and identify with particularity the information they seek to compel.

For its part, Verizon argues vigorously that Rule 27(a) is not sufficiently analogous to § 512(h) to be instructive. Primarily, Verizon contends that Rule 27(a) is distinguished by its requirement for a clear allegation of intent to file a lawsuit. *See* 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2072 (2d ed. 1994). Under § 512(h), Verizon points out, the subpoena application need not even come from the copyright holder -- the real party-in-interest with standing to bring a lawsuit. In addition, Verizon argues, Rule 27(a) does not allow actual discovery but only the preservation of evidence where necessary, *see Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1376 (D.C. Cir. 1995), and allows the adverse party the opportunity to contest the petition to perpetuate testimony, *see* Fed. R. Civ. P. 27(a)(2).

These differences, however, are neither as substantial nor as consequential as Verizon contends. First, although an entity seeking a subpoena under § 512(h) need not state that it expects to be a party to an action cognizable in federal

court, it does have to make a sworn statement of good faith belief that a copyright is being used in an unauthorized manner--a statement largely to the effect that a copyright action cognizable in federal court could be asserted (if not by the party seeking the subpoena then by its principal, the copyright holder). Thus, § 512(h), like Rule 27(a), requires as a prerequisite to court action a significant showing as to the existence of a breach or violation into which the court could ultimately be drawn. Moreover, in neither the Rule 27(a) nor the § 512(h) setting can the court be certain that a judicial action will ever be filed. *See Penn Mut.*, 68 F.3d at 1374 ("[A] party need not demonstrate that litigation is an absolute certainty in order to perpetuate testimony pursuant to Rule 27(a).").

With respect to Verizon's distinction between discovery and preservation of evidence under Rule 27(a), it is undisputed that some service providers (although not Verizon) might log only temporarily the identifying information sought on a § 512(h) subpoena. *See* Tr. of April 1, 2003, Hearing at 14-15; Declaration of Frank Creighton ¶ 16. Hence, § 512(h), like Rule 27(a), provides a method for preserving, not merely discovering, information essential to a potential lawsuit. Also lacking in merit is Verizon's argument that Rule 27(a) is distinguished by the possibility of adversarial proceedings contesting the petition. The alleged infringer may receive no notice of a § 512(h) subpoena before his identity is released, but the entity subpoenaed (the service provider) does have the opportunity to contest the subpoena in federal court before it is enforced. *See, e.g., ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) (action addressing service provider's resistance to DMCA subpoena). In other words, § 512(h) does not authorize an entirely *ex parte* form of judicial compulsion.

Overall then, despite Verizon's objections, Rule 27(a) provides a compelling precedent for judicial compulsion of information outside the context of a pending case or controversy. Furthermore, taking Rule 27(a) together with the other analogues discussed above, there is ample basis for the Court to conclude that the role assigned to the clerk of the court in § 512(h) is countenanced by the Constitution.

Notwithstanding Verizon's contentions, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988), and *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996), do not undermine this conclusion. In *Catholic Conference*, the Supreme Court held that where a district court lacks subject matter jurisdiction over an action, it also lacks power to issue a contempt citation for failure to comply with a subpoena issued in connection with that action. 487 U.S. at 80, 108 S. Ct. 2268. In *Houston Business Journal*, the D.C. Circuit held that a district court lacks power to issue a subpoena when the underlying action is asserted in state, not federal, court. 86 F.3d at 1213.

Importantly, in both *Catholic Conference* and *Houston Business Journal*, the only conceivable source for the district court's jurisdiction to issue a subpoena was a pending case or controversy; it was the absence of a sound federal case or controversy that was thus fatal to the validity of the subpoenas in question. Here, in contrast, Congress has expressly provided the clerk of the court with the authority to issue § 512(h) subpoenas; thus the clerk need not draw upon the powers arising from jurisdiction over a pending case or controversy. Section 512(h) accordingly presents a situation neither expressly contemplated nor ruled out by the holdings in *Catholic Conference* and *Houston Business Journal*. Indeed, the D.C. Circuit implicitly recognized in

Houston Business Journal that in settings such as Rule 27(a) the federal courts' subpoena power may properly be asserted in the absence of subject matter jurisdiction over an underlying action. *See* 86 F.3d at 1213.

Verizon seeks to bolster its position by arguing that § 512(h) offends the policy concerns that underlie the case-or-controversy requirement. According to Verizon, this requirement "ensures both that the judiciary does not take on non-adjudicatory tasks and that neither Congress nor the Executive attempts to foist non-judicial duties on the Article III courts." Verizon's Br. Supp. Mot. Quash at 5 (emphasis omitted). Duties that are inconsistent with the judicial function, Verizon contends, "undermine public confidence in the independence and impartiality of the judiciary and take the courts' resources away from their primary role." *Id.* By putting the judiciary in the role of the copyright holder's "investigator," Verizon maintains, § 512(h) implicates both of these concerns.

The Court does not agree. In *Morrison v. Olson*, the Supreme Court identified two principal concerns underlying the general rule, derived from the case-or-controversy requirement, that "'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" 487 U.S. at 677, 108 S. Ct. 2597 (quoting *Buckley v. Valeo*, 424 U.S. 1, 123, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). First, the rule "help[s] ensure the independence of the Judicial Branch"; second, it "prevent[s] the Judiciary from encroaching into areas reserved for other branches." *Id.* at 678, 108 S. Ct. 2597.

Neither of these concerns is implicated here. Verizon does not appear to be arguing that the second of these concerns is threatened and, in fact, it is clear enough that the activity under § 512(h) poses no danger of encroachment or aggrandizement. Under § 512(h), the clerk carries out a

nondiscretionary duty that allows one private party to retrieve information from another private party. This rather passive, ministerial function by court personnel in no way resembles or impedes upon the authority of the Executive and Legislative Branches to pursue active investigation of possible civil or criminal wrongdoing. As the Supreme Court has noted, the "separation of powers 'left to each [Branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial.'" *Mistretta v. United States*, 488 U.S. 361, 386, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (quoting *Myers v. United States*, 272 U.S. 52, 291, 47 S. Ct. 21 (1926) (Brandeis, J., dissenting)). Here, the minimal role of court personnel in issuing a § 512(h) subpoena "does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's [or Legislature's] authority to require that the Act be invalidated as inconsistent with Article III." *Morrison*, 487 U.S. at 683, 108 S. Ct. 2597.[11]

With respect to the first concern elucidated in *Morrison*, there is simply no basis to conclude that § 512(h) undermines the independence or institutional integrity of the Judicial Branch. Under § 512(h), the district court does not take sides in the copyright holder's request for the alleged infringer's name, but rather, through the clerk, serves as a passive, neutral instrument facilitating the attempt to retrieve the name. Furthermore, an Article III judge does not by virtue of the clerk's action become in any way invested in either the request for the alleged infringer's

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[11] To the extent that a district court issuing a § 512(h) subpoena is properly understood to be exercising nothing other than a ministerial function, it is worth noting that the Supreme Court in *Morrison* held that the assumption of "essentially ministerial" powers by a special court under the Ethics in Government Act of 1978 did not impermissibly trespass upon the authority of the Executive Branch. *Id.* at 681, 108 S. Ct. 2597.

name or the potential copyright infringement case. The judge will still be able to approach any dispute over the information retrieval or the underlying copyright infringement in an entirely objective, unbiased fashion.

In short, given that the clerk only, and not a federal judge, issues a subpoena, § 512(h) does not "pose[ ] any threat to the 'impartial and independent federal adjudication of claims within the judicial power of the United States.' " *Id.* at 683, 108 S. Ct. 2597 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)). Any possible public perception that federal judges are being enlisted by copyright holders *ex parte* to investigate possible infringement would be based upon a complete misapprehension of how § 512(h) actually operates, and thus cannot provide a basis for striking down the provision.

There may be some merit, albeit quite limited, to Verizon's argument that § 512(h) foists a burden upon the Article III branch that could impede the judiciary's ability to perform its primary function--adjudication. Although no federal judge need allocate his or her time to issuing § 512(h) subpoenas, if, as Verizon hypothesizes, copyright holders start to present the clerks of the federal courts with tens of thousands of subpoena requests, some strain on the administrative resources of the judicial branch may result. But to date, that concern is entirely speculative, as no such barrage of requests has occurred. The statutory requirements for seeking a subpoena under § 512(h) serve, to some extent, to curtail the threat. Morever, Congress could ameliorate any additional burden on the courts by providing additional funding or resources. Verizon's challenge based on limited resources of the judiciary therefore cannot carry the day at this time.

In sum, § 512(h) does not place the Article III branch in a role inconsistent with that accorded to it under the Constitution. To the extent that the power of the judiciary is even implicated by the issuance of a subpoena under § 512(h), which assigns only a ministerial function to the clerk of the court, there are abundant analogues both in the criminal and civil contexts for judicial action in the absence of a pending federal case or controversy, including the close parallel of Rule 27.[12] And whatever authority is granted under § 512(h) presents neither a danger of encroachment nor some other threat to the institutional integrity and independence of the judiciary. Accordingly, and in light of the reluctance of the federal courts to declare an Act of

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[12] Because the Court concludes that § 512(h) is constitutional on the grounds that it involves only a ministerial function by judicial personnel and is consonant with the role that federal courts have long played in other settings, the Court need not reach an alternate argument advanced by RIAA and the United States--that a case or controversy sufficient to provide a jurisdictional basis for the issuance of a subpoena inheres in the dispute between the copyright holder and the service provider over disclosing the alleged infringer's name. The Court notes, however, that when requesting a subpoena from the clerk of the court, a copyright holder need not assert that a disagreement over whether to provide the alleged infringer's name has emerged or will emerge. *See* 17 U.S.C. § 512(h)(1), (2). Indeed, the § 512(h) subpoena may constitute the copyright holder's first request for the alleged infringer's name, and conceivably the service provider will have no objections to disclosing the name (although, in this particular case, RIAA did make a pre-subpoena request for the name and Verizon did object). Thus, at the time of issuance, a § 512(h) subpoena will not necessarily be tethered to a present or even anticipated "adversary proceeding, involving a real, not a hypothetical, controversy" over providing the name. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730 (1933). Section § 512(h) is therefore not, as RIAA and the United States contend, analogous to 29 U.S.C. § 1132(c)(1), which allows an ERISA beneficiary to bring a civil action against a plan administrator for information only after the administrator has failed or refused to comply with a request for the information.

Congress unconstitutional, *see Mistretta*, 488 U.S. at 384, 109 S. Ct. 647,[13] and the substantial deference owed to Congress on copyright matters, *see Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 785, 788, 790, 154 L. Ed. 2d 683 (2003), Verizon's contention that § 512(h) is unconstitutional must fail.

III. SECTION 512(h) DOES NOT VIOLATE THE FIRST AMENDMENT

Verizon also contends that the subpoena authority in 512(h) violates the First Amendment rights of Internet users -- by piercing their anonymity -- both because it does not provide sufficient procedural protection for expressive and associational rights and because it is overbroad and sweeps in protected expression. Although these are certainly important considerations, the Court concludes that § 512(h) does not offend the First Amendment.

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[13] Verizon cites Justice Scalia's dissenting opinion in *Morrison* for the proposition that deference is not owed to Congress in assessing the constitutionality of a statute where separation of powers issues are at stake. But one of the factors motivating Justice Scalia's conclusion that deference was unwarranted in *Morrison* was the fact that, in that case, the "political branches [were] ... in disagreement" as to the constitutionality of the statute at issue, and thus neither branch could "be presumed correct." *Morrison*, 487 U.S. at 705, 108 S. Ct. 2597 (Scalia, J., dissenting). Here, of course, the Executive Branch has now intervened in this case to defend the constitutionality of the statute, and hence the political branches are in full accord. Moreover, in *Mistretta*, which followed *Morrison* and involved separation of powers issues concerning the independence and integrity of the judiciary, the Supreme Court stated unequivocally: "'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.'" 488 U.S. at 384, 109 S. Ct. 647 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (opinion concurring in judgment)).

A. Verizon Has Standing to Assert the First Amendment Rights of its Subscribers

A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).[14] This rule prevents "premature interpretations of statutes in areas where their constitutional application might be cloudy" and "assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). The Supreme Court "has altered its traditional rules of standing to permit -- in the First Amendment area -- 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)). As the Supreme Court stated in *Broadrick:*

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court

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[14] Although RIAA does not directly challenge Verizon's standing to assert the First Amendment rights of its subscribers, the Court nonetheless must determine whether Verizon has standing to bring these claims. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)).

> to refrain from constitutionally protected speech or expression.

Id.; accord Joseph H. Munson Co., 467 U.S. at 956, 104 S. Ct. 2839 (party may assert First Amendment overbreadth challenge "of another without regard to the ability of the other to assert his own claim"). Thus, even though Verizon's two subscribers here could arguably assert their own rights,[15] Verizon nonetheless may assert a First Amendment challenge on their behalf.

Although Verizon's First Amendment rights are not directly implicated by RIAA's subpoenas, "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society -- to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Joseph H. Munson Co.*, 467 U.S. at 958, 104 S. Ct. 2839.

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.

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[15] The alleged infringers could assert their own First Amendment rights, while still protecting their anonymity, as "John Doe" litigants. Verizon has now notified both subscribers of RIAA's subpoenas and allegations of copyright infringement.

Id. at 956, 104 S. Ct. 2839. A plaintiff's "ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake." *Id.* at 958, 104 S. Ct. 2839.

Verizon is, moreover, an adequate advocate to assert the First Amendment rights of its subscribers. The relationship between an Internet service provider and its subscribers is the type of relationship courts have found will ensure that issues will be "concrete and sharply presented." Verizon has a vested interest in vigorously protecting its subscribers' First Amendment rights, because a failure to do so could affect Verizon's ability to maintain and broaden its client base. The Supreme Court has recognized third-party standing in similar business/client relationships. *See Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (bookstores may raise First Amendment rights on behalf of booksellers); *Joseph H. Munson Co.*, 467 U.S. at 958, 104 S. Ct. 2839 (professional fundraiser may assert First Amendment rights of its client charities); *Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990) ("A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle."); *Craig v. Boren*, 429 U.S. 190, 194-97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (beer vendor may assert equal protection claims of males not allowed to purchase beer until they turn 21); *see also Broadrick*, 413 U.S. at 612, 93 S. Ct. 2908 ("Overbreadth attacks [raised by third-parties] have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations."). Verizon's relationship with its client subscribers is the kind of relationship that

warrants allowing Verizon to assert a First Amendment challenge on their behalf.[16]

B. The First Amendment Protects Anonymous Expression on the Internet

The Supreme Court has recognized a right of anonymity within the First Amendment. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (invalidating, on First Amendment grounds, a Colorado statute that required initiative petitioners to wear identification badges); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (overturning Ohio law that prohibited distribution of campaign literature without name and address of the person issuing the literature; "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent"); *Talley v. California*, 362 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (invalidating California statute prohibiting distribution of handbills without name and address of preparer).[17] Courts have also recognized that the protections of the First Amendment reach expression on the Internet. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874

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[16] The Court is also aided in this case by the submissions of *amici* representing the interests of Internet users.

[17] Courts have acknowledged some limitations on the subpoena power when its invocation affects First Amendment rights involving anonymity. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (discussing First Amendment implications of civil subpoena to disclose membership list); *Doe v. 2TheMart.Com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001) (addressing First Amendment rights when corporation served subpoena on ISP to obtain identity of anonymous shareholders in derivative action); *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 489 (C.D.Cal.1981) (discussing First Amendment implications of civil subpoena to disclose names of confidential journalistic sources).

(1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates further than it could from any soapbox."); *2TheMart.Com*, 140 F. Supp. 2d at 1092 ("First Amendment protections extend to speech via the Internet.").

An individual's anonymity may be important for encouraging the type of expression protected by the First Amendment. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42, 115 S. Ct. 1511. Indeed, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *Id.* at 342, 115 S. Ct. 1511. As stated in *Talley*, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." 362 U.S. at 64, 80 S. Ct. 536. Hence, several lower court cases have found that First Amendments rights, particularly the right to anonymity, extend to expression on the Internet. *See, e.g., 2TheMart.Com*, 140 F. Supp. 2d at 1097 ("the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded"); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (striking law "that prevents people from communicating and accessing information anonymously"); *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing "legitimate and valuable right to participate in online forums anonymously or pseudonymously").

But when the Supreme Court has held that the First Amendment protects anonymity, it has typically done so in cases involving core First Amendment expression. *See, e.g., Watchtower Bible, Tract Society of New York, Inc. v. Village of*

Stratton, 536 U.S. 150, 153, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002) (striking down ordinance requiring permit for door-to-door advocacy "not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills"); *Buckley*, 525 U.S. at 199, 119 S. Ct. 636 (striking down petition circulation rule requiring petitioners to be registered voters because "that endeavor . . . of necessity involves . . . the expression of a desire for political change"); *McIntyre*, 514 U.S. at 346, 115 S. Ct. 1511 ("the speech in which Mrs. McIntyre engaged -- handing out leaflets in the advocacy of a politically controversial viewpoint -- is the essence of First Amendment expression"). As the Supreme Court has explained, "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 346, 115 S. Ct. 1511 (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)). "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347, 115 S. Ct. 1511.

The DMCA, however, does not directly impact core political speech, and thus may not warrant the type of "exacting scrutiny" reserved for that context. Section 512(h) deals strictly with copyright infringement. Verizon concedes, as it must, that there is no First Amendment defense to copyright violations. The "Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement." *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000); *see Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985) (rejecting First Amendment challenge to copyright infringement action); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 574-78, 97 S.

Ct. 2849, 53 L. Ed. 2d 965 (1977). In other words, "the First Amendment is not a license to trammel on legally recognized rights in intellectual property." *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143 (11th Cir. 1990) (quotations omitted). Indeed, copyrights serve as important incentives to encourage and protect expression: "the Framers intended copyright itself to be the engine of free expression." *Eldred*, 123 S. Ct. at 788 (quoting *Harper & Row*, 471 U.S. at 558, 105 S. Ct. 2218). "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* Nonetheless, the Court concludes for present purposes that there is some level of First Amendment protection that should be afforded to anonymous expression on the Internet, even though the degree of protection is minimal where alleged copyright infringement is the expression at issue.

C. § 512(h) Provides Sufficient Safeguards to Protect Internet Users' Rights

Verizon maintains that the DMCA does not provide adequate safeguards to protect Internet users' rights of expression and association. In this regard, Verizon relies heavily on the Supreme Court's decision in *Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971), which overturned a federal statute authorizing prior restraint and censorship of obscene materials sent through the mail. The Court in *Blount* held that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn," and thus "[t]he separation of legitimate from illegitimate speech calls for sensitive tools." *Id.* at 417, 91 S. Ct. 423 (quoting *Speiser v. Randall*, 357 U.S. 513, 525, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)). The strictures in *Blount* and its progeny, however, do not apply outside the obscenity realm; moreover, even if they did, the DMCA contains adequate safeguards to ensure

that the First Amendment rights of Internet users will not be curtailed.

Blount struck down a statute that authorized the Postmaster General to halt the use of the mails for commerce in allegedly obscene materials and permitted detention of mail pending resolution of an obscenity determination.

> Since § 4006 on its face, and § 4007 as applied, are procedures designed to deny use of the mails to commercial distributors of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech. Rather, the First Amendment requires that procedures be incorporated that ensure against the curtailment of constitutionally protected expression, which is often separate from obscenity only by a dim and uncertain line.

400 U.S. at 416, 91 S. Ct. 423 (citations omitted). Because the government was censoring speech and regulating obscenity, the Court "insist[ed] that regulations of obscenity scrupulously embody the most rigorous procedural safeguards." *Id.* "[T]he fatal flaw of the [statute's] procedure," the Court explained, was that it "fail[ed] to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material." *Id.* at 418, 91 S. Ct. 423.

The Supreme Court's decision in *Blount* cannot be read as broadly as Verizon would like. The statute challenged in *Blount* authorized government censorship and prior restraint

of allegedly obscene material sent through the mail, without any judicial determination of obscenity. In such circumstances, the Court emphasized, "the censor's business is to censor." *Id.* at 419, 91 S. Ct. 423. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.'" *Id.* (quoting *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965)). The Court emphasized that "it is vital that prompt judicial review on the issue of obscenity--rather than merely probable cause -- be assured on the Government's initiative before the severe restrictions in [the statute] are invoked." *Id.* at 420, 91 S. Ct. 423.

Unlike the statute in *Blount*, however, the DMCA neither authorizes governmental censorship nor involves prior restraint of potentially protected expression. Section 512(h) merely allows a private copyright owner to obtain the identity of an alleged copyright infringer in order to protect constitutionally-recognized rights in creative works; it does not even directly seek or restrain the underlying expression (the sharing of copyrighted material). Thus, the DMCA does not regulate protected expression or otherwise permit prior restraint of protected speech. It only requires production of the identity of one who has engaged in unprotected conduct sharing copyrighted material on the Internet. The statute in *Blount*, in contrast, authorized both prior restraint and censorship by the government -- a far more "severe restriction" on First Amendment rights. Content-based prior restraint of expressive activity, the Supreme Court has held, warrants the strictest scrutiny known to First Amendment jurisprudence. *See New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) (per curiam) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its

constitutional validity.'") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963)). The DMCA places no limits on protected activity; it governs unprotected copyright piracy, and § 512(h) reaches only the identity of the subscriber (already known to the service provider), not any underlying expression. Moreover, the content of § 512(h) is not obscenity but copyright legislation, where "[t]he wisdom of Congress' action . . . is not within [the Court's] province to second guess." *Eldred*, 123 S. Ct. at 790.

The Supreme Court has not extended *Blount's* requirements of "built-in safeguards" and judicial review beyond the obscenity context,[18] and lower federal courts have declined to apply *Blount* and its progeny in other contexts.[19] Because the DMCA does not address obscenity

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[18] The application of *Blount* has been limited to obscenity settings. *See, e.g., FW/PBS v. City of Dallas*, 493 U.S. 215, 239, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (licensing ordinance for adult entertainment industry); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (sex and nudity in play); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 55, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (Georgia obscenity law relating to films in theaters); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 368, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971) (forfeiture of obscene photographs found in luggage); *United States v. Reidel*, 402 U.S. 351, 359, 91 S. Ct. 1410, 28 L. Ed. 2d 813 (1971) ("if government chooses a system of prior restraints as an aid to its goal of proscribing obscenity, the system must be designed to minimize impact on speech which is constitutionally protected") (Marshall, J., concurring). In a First Amendment challenge involving a labor context, the Supreme Court--citing *Blount*--explained that "[i]n other First Amendment contexts, of course, we have required swift judicial review of the challenged governmental action. In this context, we do not believe that such special judicial procedures are necessary." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n. 20, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

[19] *See, e.g., Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 775 (11th Cir. 2000) (*Blount* line of cases "predominantly involved censorship"of obscene materials); *O'Connor v. City and County of Denver*,

and does not censor or otherwise authorize prior restraint of expression, the Court finds Verizon's reliance on *Blount* is misplaced.

Even if such safeguards were required, however, the DMCA includes sufficient procedures to prevent any substantial encroachment on the First Amendment rights of Internet users. Before a copyright owner (or its agent) can obtain a § 512(h) subpoena, for example, one must have a "good faith belief" that the use of copyrighted material is not authorized by the owner. 17 U.S.C. § 512(c)(3)(A)(v). Moreover, the DMCA requires a copyright owner to submit

> a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

Id. § 512(h)(2)(c). The DMCA also requires a person seeking a subpoena to state, under penalty of perjury, that he is authorized to act on behalf of the copyright owner. *Id.* § 512(c)(3)(A)(vi). These provisions provide substantial protection for Internet users against baseless or abusive subpoenas.[20] In fact, the statute contains an important

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894 F.2d 1210, 1223 (10th Cir. 1990) ("The *Freedman* requirements [adopted by the Court in *Blount*] are limited to prior restraints on protected expression."); *United States v. Outpost Development Corp.*, 369 F. Supp. 399, 402 (C.D.Cal.1973) ("[w]e read *Blount* as being applicable to questions involving alleged obscenity, but not to alleged fraudulent schemes"); *Lynch v. Blount*, 330 F. Supp. 689, 694 (S.D.N.Y.1971) ("We think the safeguards defined in *Blount* for obscenity cases are wholly inappropriate, unnecessary and inapplicable to the field of commercial fraud.").

[20] Congress specifically enacted these procedural requirements to prevent mistakes and abuse. *See* S.Rep. No. 105-190, at 9 (explaining that the DMCA contains "important procedural protections for individual Internet users to ensure that they will not be mistakenly denied access to the World Wide Web").

disincentive for false representations, thereby further protecting against abusive or harassing subpoenas. *See id.* § 512(f) (any person who "knowingly materially misrepresents" that activity is infringing "shall be liable for damages, including costs and attorneys' fees, incurred by the alleged infringer" as a result of the misrepresentation). With all these protections, it is unlikely that § 512(h) will require disclosure, to any significant degree, of the identity of individuals engaged in protected anonymous speech, as opposed to those engaged in unprotected copyright infringement.

Verizon asserts that, under the DMCA, a copyright owner does not have to demonstrate that the allegation of copyright infringement could withstand a motion to dismiss. However, in order to obtain a subpoena, the copyright owner must, in effect, plead a prima facie case of copyright infringement. *See Feist Publ'ns, Inc. v. Rural Tel. Svc. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991) (the elements of a prima facie case of copyright infringement are "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original"); *accord, Lulirama, Ltd. v. Axcess Broadcast Svcs.*, 128 F.3d 872, 884 (5th Cir. 1997). Under § 512, one must assert ownership of an exclusive copyright, § 512(c)(3)(A)(i), and a good faith belief that the use of copyrighted material is not authorized, § 512(c)(3)(A)(v). In other words, the subpoena notification must establish ownership and unauthorized use -- a prima facie case of copyright infringement.[21]

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[21] Although the standard for obtaining a § 512(h) subpoena differs somewhat from the standard for obtaining a subpoena through the more traditional procedure governed by Fed. R. Civ. P. 11, the difference is not substantial. Under § 512(c)(3)(A)(v), a copyright owner must have a "good faith belief" that the use of the copyrighted material is not authorized. Under Rule 11, a party or attorney can be sanctioned absent

Lastly, the DMCA provides that the Federal Rules of Civil Procedure govern the issuance, service, enforcement, and compliance of subpoenas. 17 U.S.C. § 512(h)(6). Hence, access to the courts and the judicial supervision Verizon urges to protect Internet users is available. Service providers or their subscribers, for example, can employ Fed.R.Civ.P. 45 to object to, modify or move to quash a subpoena, or even to seek sanctions. *See, e.g.*, Fed. R. Civ. P. 45(c)(1) (authorizing sanctions for overbroad, burdensome, or vexatious subpoenas). This adds yet another layer of protection for Internet users.[22] Thus, in sum, the Court rejects Verizon's contention that § 512 does not provide sufficient safeguards or judicial supervision to protect Internet users' First Amendment rights, including anonymity.

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an "objective" basis that the claim was sound. *See Tahfs v. Proctor*, 316 F.3d 584, 594 (6th Cir. 2003) (requiring objective basis for claims under Rule 11); *Byrne v. Nezhat*, 261 F.3d 1075, 1105-06 (11th Cir. 2001) (same). Both procedures allow for sanctions for any baseless or meritless claims.

[22] These provisions under § 512 are precisely the type of procedural requirements other courts have imposed--in non-copyright cases -- to compel a service provider to reveal the identity of anonymous Internet users. *See Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578-80 (N.D.Cal.1999) (in trademark dispute against anonymous person, court required plaintiff to identify person with specificity, identify all steps taken to locate elusive person, establish that suit could withstand motion to dismiss, and show "probable cause [as] a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong"); *Doe v. 2TheMart.Com, Inc.*, 140 F. Supp. 2d. at 1095 (to obtain subpoena to identify anonymous poster of criticism of corporation, party must show it was acting in good faith and not for an improper purpose, that information directly related to core claim, and that information was unavailable from any other source); *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, * 8 (Va. Cir. Ct. Jan.31, 2000) (to obtain identity of anonymous Internet users, court required that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable" and that information sought "is centrally needed to advance that claim").

D. Section 512(h) Is Not Overbroad

Verizon claims that the § 5121(h) subpoena authority is substantially overbroad and will chill protected anonymous speech and association. As explained earlier, the overbreadth doctrine permits facial challenges to statutes on the ground that the statute or regulation reaches constitutionally protected speech of parties not before the court. *Broadrick*, 413 U.S. at 612-15, 93 S. Ct. 2908. If a statute is substantially overbroad, and thus sweeps within its proscriptions a good amount of protected expression, the statute is unconstitutional. The doctrine is predicated on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612, 93 S. Ct. 2908.

The scope of § 512(h) may impact some protected expression and association, in that the threat of a subpoena under the DMCA, and the resulting disclosure of identity, could discourage some Internet users from otherwise protected activity. It is also possible that a copyright owner could mistakenly pursue, and obtain, the identity of an anonymous Internet user who was not, in actuality, infringing copyrighted materials. Yet, "[t]o prevail in a facial challenge, however, it is not enough for a plaintiff to show 'some' overbreadth. Rather, the overbreadth of a statute must not only be real, but substantial as well." *Ashcroft v. ACLU*, 535 U.S. 564, 584, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (citations omitted); *Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face."). The § 512(h) subpoena authority hardly amounts to a real or substantial threat to protec ed expression. Indeed, Verizon has not come forward with any evidence that in the five years since the DMCA was enacted, § 512(h)

subpoenas have been used to identify anyone but Internet users engaging in copyright infringement.[23]

Verizon also portends that § 512(h) could be used by "cyberstalkers" to issue fraudulent subpoenas to obtain identifying information (such as phone numbers and addresses) about people they meet in Internet chat rooms. Of course, this anonymity issue, although perhaps somewhat related to a First Amendment expressive interest, is generated more by safety concerns. As such, it may be more properly considered as a policy argument against broad subpoena authority, and therefore a matter for Congress rather than this Court. But in any event, requirements in the DMCA should prevent such speculation from ever becoming a reality. In order to get a subpoena, one must identify the material claimed to be infringing, and information reasonably sufficient to permit the service provider to locate the material. *See* § 512(c)(3)(A)(iii). Likewise, § 512(c)(3)(A)(ii) requires identification of the online site where the copyrighted works are claimed to be infringed. Although conceivably one could falsify such information in a subpoena, the information is also easily verifiable by service providers, who can provide an additional check against fraudulent conduct. In fact, the remedial provisions of the DMCA, including the right to damages for misrepresentation, attorneys fees, contempt

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[23] Verizon highlights an incident involving a notice to an Internet service provider alleging possible copyright infringement of a Harry Potter film. The allegedly infringing work turned out to be a child's book report, which the "robotic" software could not distinguish from the copyrighted work. However, the copyright owner did not issue a § 512(h) subpoena, but merely notified the service provider by letter of the alleged infringement. Such mistakes are possible using evolving technology, but there is nothing to suggest they will cause substantial chilling of expression on the Internet.

sanctions and even the possibility of criminal perjury charges, should deter potential stalkers.

The risk of cyberstalking and any accompanying impact on expressive interests, then, is minimal. As the Supreme Court has explained, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800, 104 S. Ct. 2118. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face." *Ferber*, 458 U.S. at 770, 102 S. Ct. 3348. Again, it is noteworthy that although it has been nearly five years since § 512 came into effect, there is nothing in the record to indicate that the DMCA subpoena authority has been used for stalking or other fraudulent purposes. Hence, while conceivable, Verizon's cyberstalking scenario is unlikely, and the DMCA cannot be found unconstitutionally overbroad on such a thin reed of speculation. *See Taxpayers for Vincent*, 466 U.S. at 800 n. 19, 104 S. Ct. 2118 ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine.") (quoting *Broadrick*, 413 U.S. at 630, 93 S. Ct. 2908 (Brennan, J., dissenting)); *Ferber*, 458 U.S. at 771, 102 S. Ct. 3348 ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.").

The Supreme Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Osborne*

v. Ohio, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). Any overbreadth resulting from § 512(h) that arguably chills First Amendment expression or association is neither "real" nor "substantial" in relation to the DMCA's "plainly legitimate sweep" of identifying copyright infringers. The extent of copyright infringement and piracy of intellectual property over the Internet, on the other hand, is well-recognized and "has reached epidemic proportions." *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D.Cal.2002). The recording industry has suffered substantial losses due to Internet piracy Whatever marginal impact the DMCA subpoena authority may have on the expressive or anonymity rights of Internet users, then, is vastly outweighed by the extent of copyright infringement over the Internet through peer-to-peer file sharing, which is the context of the legitimate sweep of § 512(h).

The DMCA does not regulate expression, and § 512(h) is not directed at the suppression of expression. Indeed, Congress enacted the DMCA in part to *spur* and *promote* expression, not suppress it. Congress was concerned that "copyright owners [would] hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy." S. Rep. No. 105-190, at 8 (1998). The ability to copyright, in fact, is "the engine of free expression." *Eldred*, 123 S. Ct. at 788 (quoting *Harper & Row*, 471 U.S. at 558, 105 S. Ct. 2218). Hence, the DMCA *fosters* speech by helping artists, musicians, and authors protect their creative works, in turn encouraging further expression.

The Supreme Court has cautioned that application of the overbreadth doctrine "is, manifestly, strong medicine." *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908. The doctrine is therefore employed "with hesitation, and then 'only as a last resort.'" *Ferber*, 458 U.S. at 769, 102 S. Ct. 3348 (quoting

Broadrick, 413 U.S. at 613, 93 S. Ct. 2908). "[T]here must be a *realistic danger* that the statute itself will *significantly compromise* recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent*, 466 U.S. at 801, 104 S. Ct. 2118 (emphasis added). Verizon simply has not shown that the subpoena authority under § 512(h) is so overbroad that it sweeps a substantial amount of protected expression within the DMCA's proscriptions. Verizon's bald speculation of mistakes, abuse or harassment that has yet to occur to any degree (let alone to any substantial degree) since the statute was enacted is simply not enough. "[J]udged in relation to the statute's plainly legitimate sweep," and in light of the extent of copyright piracy over the Internet, any impact on expressive and associational rights on the Internet is negligible.

Ultimately, Verizon suggests that even if § 512(h) is not found facially unconstitutional, it should nonetheless be construed narrowly so as to avoid serious First Amendment issues. "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 465-66, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (citation omitted). Hence, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 466, 109 S. Ct. 2558.

To begin with, this Court has already determined in its *First Subpoena Decision* that the construction of § 512(h) Verizon proposes is not plausible given the statutory

language, context, purpose and legislative history, and thus would be "plainly contrary to the intent of Congress." Moreover, before this constitutional avoidance doctrine can be applied, a Court must first be faced with a "grave" constitutional question, *AAPS v. Clinton*, 997 F.2d 898, 906 (D.C. Cir. 1993), or a "formidable constitutional difficult[y]," *Public Citizen*, 491 U.S. at 466, 109 S. Ct. 2558. Here, § 512(h) does not present a grave or formidable constitutional problem. As explained above, the Court rejects Verizon's First Amendment challenge to § 512(h).[24] "[T]he Court need not apply ... the doctrine ... where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional." *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Even if the Court were presented with such grave doubts, moreover, Verizon's proposed construction of the statute would not eliminate the constitutional problem, but rather would only reduce it. The Court has construed § 512(h) as applying to all service providers under the DMCA, including those falling within the conduit functions under subsection (a). Verizon would construe § 512(h)'s subpoena power to apply only to subsection (c), where the subscriber stores his allegedly infringing material on the service provider's system. But Internet users who fall within subsection (c) have anonymity interests identical to users within subsection (a), and hence would be susceptible to the same chilling of expressive and associational rights asserted by Verizon. Thus, Verizon's construction would only mean

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[24] Constitutional avoidance does not apply to Verizon's Article III challenge, as no limiting construction of § 512(h) would cure that alleged constitutional defect--the alleged "case or controversy" deficiency pertains to *any* subpoena, whether addressed to a subsection (a) or subsection (c) service provider.

that fewer users would have their First Amendment interests impacted -- the same alleged constitutional problem would persist to some degree.

"The principle . . . is a categorical one: as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S. Ct. 1759, 114 L. Ed. 2d 233(1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S. Ct. 105, 72 L. Ed. 206 (1927)). But reading § 512(h) as applying only to subsection (c) users does not eliminate Verizon's alleged constitutional problem -- it only reduces it -- and thus will not "save" the DMCA. If the subpoena authority under § 512(h) chills expression and association, it does so as applied to both subsection (c) users and subsection (a) users. Hence, not only is the narrow construction urged by Verizon not a plausible one to which § 512(h) is "genuinely susceptible," as this Court has previously found, *see First Subpoena Decision*, 240 F. Supp. 2d at 30-39, but it would not save § 512(h) from the alleged constitutional infirmity in any event.

In the end, Verizon's customers should have little expectation of privacy (or anonymity) in infringing copyrights. Subscribers to Verizon's Internet services are put on clear notice that they cannot use Verizon's service or network to infringe copyrights. *See* Verizon Online Terms of Service, *http://www.verizon.net/policies/popups/internetaa popup.asp*. In fact, as part of its corporate policy, Verizon alerts its subscribers at the outset that it will "disclose individual customer information to an outside entity ... when Verizon is served with valid legal process for customer information." *See* Verizon Privacy Principles, *http://www22.verizon.com/About/Privacy/genpriv*. And if an individual subscriber opens his computer to permit others,

through peer-to-peer filesharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world. *See United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (no expectation of privacy where user has opened files up on home computer to anyone who wants to receive them).

IV. VERIZON'S STAY REQUEST

Verizon emphasizes that both subpoena actions are test cases raising issues of first impression, and urges the Court to stay its rulings on both matters pending appeal. Although the Court does not dispute Verizon's characterization of these subpoena cases, novelty of issues alone does not entitle a litigant to a stay pending appeal. Applying the well-established standards in this Circuit, Verizon's request for a stay pending appeal must be denied.

A. Standard for a Stay

To obtain a stay pending appeal, Verizon "must show (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay." *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours. Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). "These factors interrelate on a sliding scale and must be balanced against each other." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("If the arguments for one factor are particularly strong, [a stay] may issue even if the arguments in other areas are rather weak."). On a motion for stay, "it is the movant's obligation to justify the court's exercise of such

an extraordinary remedy." *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).[25] Although there may be a temptation to conclude that a stay is warranted in this "test" case to enable the Court of Appeals to consider issues arguably of first impression, Verizon in fact has a heavy burden to justify an entitlement to this "extraordinary remedy."

B. Likelihood of Success on the Merits

Verizon's likelihood of success on the merits of its claims, both statutory and constitutional, is minimal. In the *First Subpoena Decision*, the Court concluded "that the subpoena power in 17 U.S.C. § 512(h) applies to all Internet service providers within the scope of the DMCA, not just those service providers storing information on a system or network at the direction of a user." 240 F. Supp. 2d at 26. Verizon argues that the Court's central reliance on the definition of the term "service provider" is "misplaced." However, the Court followed well-accepted canons of statutory construction in applying § 512(k)'s broad definition of "service provider" to the subpoena authority under § 512(h). First and foremost, the plain language of the statute's definition provision in subsection (k) mandates this result. It is only by dismissing the subsection (k) definition of "service provider" altogether that Verizon can contend otherwise. But there is no basis for ignoring that clear, governing definitional language. Where a statute "unambiguously uses a statutorily defined term, that

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[25] Although presenting a serious legal issue on appeal may weigh in favor of a stay, the movant still must demonstrate that the balance of harms strongly favors such relief. *See Nat'l Ass'n of Farmworkers v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980); *Holiday Tours*, 559 F.2d at 844. Hence, a stay will not be granted in a subpoena enforcement action simply because a novel legal issue is presented. *See FEC v. Comm'n to Elect Lyndon LaRouche*, 613 F.2d 849, 853 (D.C. Cir. 1979).

definition controls." *Wolverine Power Co. v. FERC*, 963 F.2d 446, 451 (D.C. Cir. 1992). Moreover, the structure, purpose and legislative history of the DMCA fully support the conclusion that the § 512(h) subpoena authority extends to all service providers, including those (like Verizon) who fall within subsection (a)'s conduit functions. The statutory construction issue Verizon presents may be important and even novel, but that does not necessarily mean it is close or that Verizon is likely to succeed on the merits of its appeal.

Verizon contends that the Court's construction of the DMCA renders the "take down" notification within § 512(c)(3)(A)(ii) meaningless, because "material" can only be "removed" by a service provider if it is physically stored on the provider's network or system. Under subsection (a), the copyrighted material is stored on the user's own computer, and therefore a service provider cannot remove that material. Verizon therefore argues that the § 512(h) subpoena authority can only apply to subsection (c) service providers because they store such materials on their systems. However, § 512(h) requires a copyright owner to provide the clerk with a "copy of the notification *described* in subsection (c)(3)(A)." § 512(h)(2)(A) (emphasis added). It does not require a service provider to actually "take down," or disable access to, the material alleged to be infringing. Verizon confuses the obligation of the copyright owner simply to provide a "copy" of the notification "described" in subsection (c)(3)(A) with a duty actually to "take down" the material--a duty not found in or required by subsection (h). Moreover, even if one accepted Verizon's interpretation of the statute, a service provider within subsection (a) still could satisfy subsection (c)(3)(A)(iii)'s requirement to identify the material that is to be removed or to which access is to be disabled. Again, this is only an obligation to identify the alleged infringing material, not a requirement to remove or disable access to it. Finally, even if there were such a

requirement, a service provider can "disable access" to the material by terminating the subscriber's account.

An additional statutory argument raised by Verizon to justify a stay rests on § 512(n), which provides:

> Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

17 U.S.C. § 512(n). Verizon argues that the scope of the subpoena authority should be determined in light of the service provider's *function*, rather than in accordance with the definition of "service provider" in subsection (k)(1), as this Court concluded. This argument was not initially raised in the first subpoena action, but only in Verizon's stay motion--and for good reason. Subsection (n) explicitly applies only to whether a service provider qualifies for the "limitation on liability" in subsections (a) through (d), and makes no reference whatsoever to construction of the subpoena authority under subsection (h). Thus, subsection (n) cannot be read to somehow narrow the broad definition of "service provider" set out in subsection (k).[26] That

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[26] As the Court explained in its prior decision, there is no doubt that subsection (k)'s broad definition of "service provider" applies to subsection (a) conduit functions such as providing Internet connectivity or e-mail. *See* 240 F.3d at 31. The legislative history of the DMCA makes this explicit, noting that the definition of "service provider" under subsection (k) includes "services such as providing Internet access, e-mail, chat room and web page hosting services" -- the very services within subsection (a)'s

definition is governing here, and nothing in subsection (n) is inconsistent with that conclusion.

Nor is there a substantial likelihood that Verizon will prevail on the merits of its Article III challenge to § 512(h). To be sure, the clerk of the court is not commonly called upon to issue a subpoena in the absence of a pending case or controversy. But given that the clerk only, not a federal judge, is actually involved in the issuance of a § 512(h) subpoena, and that, in any event, there is ample precedent for judicial compulsion of evidence in the absence of a pending federal court case or controversy, it is clear that the procedure authorized by § 512(h) is constitutionally permissible. Verizon thus has no more than a marginal likelihood of success on its Article III challenge.

Verizon is even less likely to prevail on its First Amendment claim. Section 512(h) does not purport to regulate speech or expression; rather, it is a tool to aid copyright owners in identifying infringers and combating Internet piracy. The subpoena provision contains a number of substantial procedural requirements aimed at preventing abuse, fraud, and mistakes, without chilling expressive or associational rights. Moreover, Verizon's overbreadth challenge fails on several grounds, and the constitutional avoidance doctrine is inapposite because a grave constitutional problem is not presented and because Verizon's suggested "saving" construction of § 512(h) is not plausible and, in any event, would only reduce, not eliminate, the alleged constitutional infirmity.

In short, there is little chance that Verizon will succeed on the merits of its statutory and constitutional claims on appeal, and surely not a "probability" or "substantial

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conduit functions. *See* S. Rep. No. 105-190, at 54; *see also* H.R. Rep. No. 105-551(II), at 64 (1998).

likelihood" of such success. "[A] court, when confronted with a case in which the other three [stay] factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Holiday Tours*, 559 F.2d at 843. In that setting, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, and difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.* at 844. As explained below, however, here the balance of harms does not favor a stay, and thus it remains "particularly important for the movant to demonstrate a substantial likelihood of success on the merits." *Dodd v. Fleming*, 223 F. Supp. 2d 15, 20 (D.D.C. 2002). Verizon has not done so -- the statutory and constitutional claims it asserts are ultimately not difficult, and there is accordingly no need for further "deliberative investigation" on them. Verizon's inability to establish a likelihood of success on the merits therefore fatally undermines its stay request.

C. Balance of Harms

Both Verizon and RIAA claim forcefully that they will be irreparably injured by an adverse stay ruling from the Court. Verizon claims the denial of a stay may moot its appeal and injure its business interests, while RIAA argues that, if a stay is granted, extensive copyright infringement would continue indefinitely. RIAA also fears that other service providers may refuse to comply with DMCA subpoenas until the Court of Appeals rules, thereby delaying RIAA's investigation of copyright infringement on the Internet.

1. Injury to Verizon

To begin with, it is difficult to appreciate Verizon's claims of harm to its interests, given that Verizon has stressed throughout this litigation that RIAA could readily

obtain the identity of the alleged infringers through a John Doe action. *See* Verizon Opp. to Mot. to Enforce, No. 02-MS-0323 (Aug. 30, 2002), at 5, 24-25; *see generally First Subpoena Decision*, 240 F. Supp. 2d at 39-41. In fact, Verizon has indicated that it will cooperate with a subpoena served under a John Doe complaint, and disclose the identity of an alleged infringer. *Id.* at 24-25; Verizon Mot. for Stay, No. 02-MS-0323 (Jan. 30, 2002), at 14. If that is the case, and it is only a question of the process for disclosure of such information, then one cannot easily fathom how Verizon would truly suffer serious, irreparable harm warranting a stay.

Verizon maintains that it will be irreparably harmed by disclosure of a user's identity because that will adversely affect the goodwill Verizon has developed with its subscribers and may scare off future business. "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wisconsin Gas Co. v. Fed. Energy Reg. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)(emphasis in original; citation omitted). Impact on business and profits "may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Id.; see also Holiday Tours*, 559 F.2d at 843 n.2. Verizon makes no showing that compliance with this one subpoena, or even with a series of subpoenas for subscribers' identities, pending appellate proceedings would threaten the very existence of its business.

In the end, then, it is difficult to discern any irreparable injury to Verizon from having to disclose, under court order, the identities of a few of its subscribers. Any harm to its goodwill is speculative and negligible. Weighing the stay factors on a sliding scale tips heavily against granting

Verizon's request for a stay where it can show only the slightest threat of irreparable injury. "Despite this flexibility, we require the moving party to demonstrate at least 'some injury,' since 'the basis for injunctive relief in the federal courts has always been irreparable harm.'" *CityFed Fin. Corp.*, 58 F.3d at 747 (quoting *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), and *Sampson v. Murray*, 415 U.S. 61, 88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)). Indeed, because the movant "ha[s] made no showing of irreparable injury here, that alone is sufficient for us to conclude that the district court did not abuse its discretion by rejecting [movant's] request." *CityFed. Fin. Corp.*, 58 F.3d at 747; *see also Dodd v. Fleming*, 223 F. Supp. 2d at 20 ("if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors"). Without irreparable injury, Verizon simply cannot justify a stay.

2. Mootness

Verizon also contends that it will be irreparably harmed absent a stay because the revelation of its subscriber's identity would moot the appeal and deprive Verizon of its statutory right to further judicial review. *See Center for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) ("defendants have made a strong showing of irreparable harm because disclosure of the documents in question will render any appeal moot"); *Center for Nat'l Security Studies v. United States Dep't of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting stay of disclosure order in FOIA case where compliance with order "would effectively moot any appeal"). RIAA counters that effective relief could still be granted and that the case falls within the "capable of repetition yet evading review" exception to mootness. RIAA has stated, moreover, that it will not argue mootness on

appeal. Hearing Tr., Mot. to Stay, 02-MS-0323 (Feb. 13, 2003), at 44.[27]

These subpoenas seem to fall within an exception to mootness. The Supreme Court has found "that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911)). In this two-part calculus, a dispute is capable of repetition if "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," and evades review if "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (*per curiam*).

Under the capable of repetition prong, a party must show a reasonable expectation "that the same parties will engage in litigation over the same issue in the future." *Pharmachemie B.V. v. Barr Laboratories*, 276 F.3d 627, 633 (D.C. Cir. 2002) (citing *Norman v. Reed*, 502 U.S. 279, 288, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)). Given the extent of copyright piracy occurring over the Internet today, and given that Verizon has 1.7 million customers, it is certainly likely that RIAA, which represents the vast majority of copyright owners of music, will serve more subpoenas, and attempt to enforce them, against Verizon in the future. In fact, since RIAA served these two subpoenas on Verizon, it has filed four others on Verizon seeking the identity of alleged

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[27] Notwithstanding RIAA's commitment, the Court recognizes that mootness goes to the jurisdiction of the Court of Appeals and hence must be considered even if not asserted by the parties.

infringers. *See* Civil Action Nos. 03-MS-0071, 03-MS-0079, 03-MS-0088, and 03-MS-0089 (D.D.C. 2003).[28] There is plainly "a reasonable expectation" that Verizon "would be subjected to the same action again." *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998).

Under the "evading review" prong of the mootness exception, the question is whether "the challenged activity is *by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *Id.* at 978 (emphasis in original). In the absence of a stay, RIAA's subpoenas probably would not be able to be adjudicated while fully "live," because user identities would be disclosed, satisfying the subpoena. This inquiry addresses the particular activity's temporal duration, that is, "[h]ow quickly must an activity begin and end to evade judicial review," and "evading review means evading Supreme Court review." *Campbell v. Clinton*, 203 F.3d 19, 33 (D.C. Cir. 2000) (Tatel, J., concurring). The context here -- copyright infringement over the Internet -- is inherently one that likely evades review. Section 512(h) expressly and repeatedly (in eight separate references) mandates that the subpoena process occur "expeditiously," for it is critical to curtail infringement as quickly as possible, given "the ease with which digital works can be copied and distributed worldwide virtually instantaneously." S. Rep. No. 105-190, at 8. The very nature of the speed, and worldwide scope, of copyright piracy over the Internet means that these subpoena issues could not be adjudicated while fully "live"

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[28] Verizon's counsel has conceded that this litigation is capable of repetition. Hearing Tr., Mot. to Stay, 02-0323 (Feb. 3, 2003), at 37. Indeed, the potentially large number of these subpoenas was one of the parade of horribles Verizon has cited to illustrate the burden Internet service providers face under RIAA's construction of the DMCA. *See* Opp. to Motion to Enforce at pp. 11-13.

(unless stays were routinely entered).[29] If subpoenas could not be enforced pending the sometimes glacial pace of full appellate review, there would be little point in seeking enforcement in the first place -- it would simply take too long to protect copyrights.

3. Harm to RIAA

The harm to RIAA, and the copyright owners it represents, from a stay is comparatively more substantial than any harm to Verizon absent a stay. The extent of copyright infringement and piracy of music recordings over the Internet has skyrocketed, resulting in enormous losses for the industry. Most importantly, if the Court entered a stay, the apparent infringement of numerous copyrighted works made available over the Internet for universal downloading could continue unabated. Unauthorized use of a copyrighted work has long been presumed to constitute irreparable harm.[30] The value of these copyrighted works could plummet further, as they are made available (at the push of a button) for the taking. Given the extensive losses to Internet piracy, the relative harm to RIAA and copyright

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[29] *See, e.g., Jefferson v. Abrams*, 747 F.2d 94, 96 (2d Cir. 1984) (in challenge to procedures for nominating candidates for special election to Congress, court reasoned that "the very speed with which such elections must be conducted makes the problem of constitutional defects in nomination procedures peculiarly one 'capable of repetition, yet evading review' ") (citing *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978)).

[30] *See Health Ins. Ass'n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) ("In copyright infringement cases, a copyright holder may be presumed to suffer irreparable harm as a matter of law when his right to the exclusive use of copyrighted material is invaded."); *Taylor Corp. v. Four Seasons Greetings*, 315 F.3d 1039, 1041-42 (8th Cir. 2003) (for purposes of injunctive relief "[i]n copyright-infringement cases, the general rule is that a showing of a prima facie case raises a presumption of irreparable harm"); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996) (same).

owners is significant and more than counter-balances Verizon's claimed harm. *See Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 924 (D.C. Cir. 1974) ("Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents.") (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).[31]

If a stay is entered, it is foreseeable that other service providers presented with subpoenas under the DMCA will seek a stay of enforcement pending appellate resolution of this "test" case.[32] Meanwhile, copyrighted works would remain open to infringement over the Internet.[33] In that setting, a stay could, effectively, serve as an injunction against any use of DMCA subpoena authority until a Court of Appeals decision, a scenario inconsistent with this Court's assessment of Congress's intent. "Every day [the stay]

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[31] Verizon's assertion that RIAA and copyright owners will not be harmed because there is a three-year statute of limitations for prosecuting copyright infringement ignores the fact that monetary damages or the recovery of royalties are not realistic remedies here. It is highly unlikely that the two individuals alleged to be infringing the copyrights of more than 600 and 800 songs respectively are in a position to pay royalties and statutory damages--at $150,000 per violation--should RIAA pursue an infringement action. Moreover, the availability of money damages will not generally overcome irreparable injury resulting from copyright infringement. *See Cadence Design Systems v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997) ("a defendant cannot, by asserting the adequacy of money damages, rebut the presumption of irreparable harm that flows from a showing of likelihood of success on the merits of a copyright infringement claim").

[32] It appears that Earthlink, another service provider, may refuse to comply with DMCA subpoenas until the Court of Appeals rules. *See* RIAA Opp. to Verizon Mot. to Stay, Ex. A, ¶ ¶ 4-10 (Whitehead Decl.).

[33] Although Verizon has notified both of the alleged infringers, only one has agreed to stop, in the future, making works available over the Internet pending complete resolution of the subpoenas.

remains in force the clearly expressed intent of Congress is being frustrated." *Heckler v. Turner*, 468 U.S. 1305, 1309, 105 S. Ct. 2, 82 L. Ed. 2d 891 (1984) (Rehnquist, J., in chambers). Even though an issue of first impression may be presented here, there is negligible harm to Verizon absent a stay, particularly in contrast to the ongoing harm facing RIAA and copyright owners (by way of unabated piracy).

4. The Public Interest

Finally, the public interest will best be served by denying Verizon's request for a stay. Under the public interest prong, the views of "Congress, the elected representatives of the entire nation," are "another sense by which public interest should be gauged." *Cuomo*, 772 F.2d at 978. "[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 497-98, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) (quoting *Virginia R. Co. v. Railway Employees*, 300 U.S. 515, 551, 57 S. Ct. 592, 81 L. Ed. 789 (1937)).[34]

It would not be in the public interest to alter the trade-offs Congress carefully crafted in the DMCA. As this Court has stated, "in exchange for complying with subpoenas under subsection (h), service providers receive liability protection from any copyright infringement . . . Hence, any additional burden [on service providers] is offset by that [liability] protection, which, of course, is exactly the contemplation reflected in the structure of the DMCA." *First*

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[34] Indeed, in the context of a stay, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered ... in balancing the hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324, 105 S. Ct. 11, 82 L. Ed. 2d 908 (1984) (Rehnquist, J., in chambers).

Subpoena Decision, 240 F. Supp. 2d. at 34 n. 6.[35] The legislative history of the DMCA reflects the congressional balancing of the interests of service providers, copyright owners, and Internet users: "the Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet." H.R. Rep. No. 105-551(II), at 21. It would not serve the public interest for Verizon to continue to receive the benefits of the legislation--liability protection -- without the concomitant obligations of disclosing the identity of an alleged infringer.

> A district court cannot, for example, override Congress' policy choice, articulated in a statute . . . Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.' *Courts of equity cannot, in their decision, reject the balance that Congress has struck in a statute.*

Oakland Cannabis Buyers' Co-op., 532 U.S. at 497, 121 S. Ct. 1711 (emphasis added) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)).[36]

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[35] Other courts have recognized the trade-offs embodied in the DMCA, giving service providers copyright liability protection in exchange for assisting copyright owners to identify infringers. *See ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *United States v. Elcom Ltd.*, 203 F. Supp. 2d at 1124.

[36] The public interest is also advanced by the considerable deference courts have long afforded Congress in regard to the scope of copyright law, particularly when it comes to new technologies. *See Eldred*, 123 S. Ct. at 772 ("[w]e defer substantially to Congress"); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)

In fact, it is well-established that "the public interest is in the interest in upholding copyright protections." *Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983) ("It is virtually axiomatic that the public interest can only be served by upholding copyright protections."); *Control Data Sys. v. Infoware, Inc.*, 903 F. Supp. 1316, 1326 (D. Minn. 1995) ("the public interest is furthered by enforcing copyright laws and preventing the infringement of copyrighted materials"). Of course, copyrights serve as important incentives encouraging creativity and protecting free speech, which furthers the public interest. "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Eldred*, 123 S. Ct. at 788. In short, the Court concludes that the public interest is best served by respecting the balance struck by Congress through the DMCA, and in upholding statutory copyright protections which encourage the dissemination of ideas. That conclusion warrants not only a rejection of Verizon's claims on the merits, but also rejection of the stay request based on an assessment of the public interest.

CONCLUSION

Verizon's motion to quash RIAA's February 4, 2003 subpoena is denied. The Court finds that § 512 of the

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("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials."). In other words, courts "are not at liberty to second-guess congressional determinations and policy judgments" regarding copyright issues, and "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred*, 123 S. Ct. at 782-83. "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably complicated by such new technology." *Sony*, 464 U.S. at 431, 104 S. Ct. 774.

DMCA, as construed by this Court in its *First Subpoena Decision*, does not violate the "case or controversy" requirement of Article III of the Constitution, and does not abridge the First Amendment rights of Internet users. Because Verizon cannot demonstrate that it has a substantial likelihood of prevailing on the merits of its statutory or constitutional claims, and has not shown that it will be irreparably harmed if a stay pending appeal is not granted, Verizon has not met its heavy burden "to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978. Verizon's request for a stay pending appeal is therefore denied.

Separate orders in this case and in Civil Action No. 02-MS-0323 (JDB) have been issued on this date.

Appendix D

United States Court of Appeals
For the District of Columbia Circuit

No. 03-7015 **September Term, 2003**
02ms00323
02ms00040

Recording Industry Association of American, Inc.
Appellee
v.
Verizon Internet Services, Inc.
Appellant

Consolidated with 03-7053 Filed on Feb. 24, 2004

BEFORE: Ginsburg, Chief Judge, Roberts, Circuit Judge, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellee's petition for rehearing filed February 2, 2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

/s/

BY: Michael C., McGrial
Deputy Clerk

Appendix E

United States Court of Appeals
For the District of Columbia Circuit

No. 03-7015 **September Term, 2003**
02ms00323
02ms00040

Recording Industry Association of American, Inc.
Appellee
v.
Verizon Internet Services, Inc.
Appellant

Consolidated with 03-7053 Filed Feb. 24, 2004

BEFORE: Ginsburg, Chief Judge, Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/s/
BY: Michael C., McGrial
Deputy Clerk

* Circuit Judge Henderson did not participate in this matter.

Appendix F

17 U.S.C. § 512

§ 512. Limitations on liability relating to material online

(a) **Transitory digital network communications.** A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for

the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System caching.

(1) Limitation on liability. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met.

(2) Conditions. The conditions referred to in paragraph (1) are that

(A) the material described in paragraph (1) is transmitted to the subsequent users described in

paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the

originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information residing on systems or networks at direction of users.

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) **Designated agent.** The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) **Elements of notification.**

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online

site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) **Information location tools.** A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) Limitation on liability of nonprofit educational institutions.

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) **Misrepresentations.** Any person who knowingly materially misrepresents under this section

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys" fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it

(g) Replacement of removed or disabled material and limitation on other liability.

(1) No liability for taking down generally. Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception. Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first

receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) **Contents of counter notification.**--To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided

notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability. A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) Subpoena to identify infringer.

(1) Request. A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request. The request may be made by filing with the clerk

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena. The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) **Basis for granting subpoena.** If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) **Actions of service provider receiving subpoena.**

Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) **Rules applicable to subpoena.** Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) **Conditions for eligibility.**

(1) **Accommodation of technology.** The limitations on liability established by this section shall apply to a service provider only if the service provider

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy

that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) **Definition.**As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) **Injunctions.** The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) **Scope of relief.**

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material

or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to

a specific, identified, online location outside the United States.

(2) **Considerations.** The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) **Notice and ex parte orders.** Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) Definitions.

(1) Service provider.

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) Monetary relief. As used in this section, the term "monetary relief" means damages, costs, attorneys" fees, and any other form of monetary payment.

(l) Other defenses not affected. The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) Protection of privacy. Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) **Construction.** Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

Appendix G

[Dept. of Justice Seal]

U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9550
Washington, D.C. 20530

SRMcIntosh
233279-2108

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September 22, 2003

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Recording Industry Association of America v.
Verizon Internet Services, Inc.
Nos. 03-7015 & 03-7053

Dear Mr. Langer:

Oral argument in this case was heard on September 17 before Judges Ginsburg, Williams, and Roberts. During the argument, Judge Roberts asked counsel for the United States about the government's views regarding the meaning of 17 U.S.C. § 512(h). Counsel informed Judge Roberts that the Copyright Office agrees with the district court's interpretation of Section 512(h).

The views of the Copyright Office regarding the proper construction of Section 512(h) were presented publicly by the Register of Copyrights, Marybeth Peters, in testimony before the Senate Committee on the Judiciary on September 9, 2003. If the members of the panel are interested in those views, Ms. Peters's statement to the Judiciary Committee is available at http://www.copyright.gov/docs/regstat090903.html.

I would appreciate if it you would bring this information to the attention of the Court. Thank you for your assistance.

Sincerely,

/s/
Scott R. McIntosh
Attorney, Appellate Staff
Civil Division

[Service list omitted]

Appendix H

Statement of Marybeth Peters
The Register of Copyrights
before the
Committee on the Judiciary

United States Senate
108th Congress, 1st Session

September 9, 2003

Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks

Mr. Chairman, Senator Leahy, Members of the Committee, good afternoon. It is always a pleasure to appear before this Committee and I thank you for inviting me to present the views of the Copyright Office today at this very timely hearing. As you were among the leaders in drafting and enacting the Digital Millennium Copyright Act ("DMCA"), I know that these issues are important to you, as they are to me.

I. Background

In 1999, a young man named Shawn Fanning developed a use of the Internet that allowed people to identify and copy music files from other people's computers. As you know, this model popularized peer-to-peer technology and a company called Napster tried to turn it into a profit-making business. Napster became phenomenally popular in a remarkably short period of time, boasting millions of registered users the very next year. But it quickly became clear that Napster was being used extensively (by millions of users) for the purpose of copying and distributing an

unprecedented number of copyrighted works, primarily sound recordings of musical works.

That was the scene when you held a hearing on July 11, 2000, Mr. Chairman, entitled "Music on the Internet: Is There an Upside to Downloading?" At that hearing, Mr. Hank Barry, then the CEO of Napster, stated "It is my firm belief that the consumers who use Napster are *not* committing copyright violations."[1] We did not agree with that assessment,[2] and we were heartened when the Ninth Circuit found that "Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction...and distribution."[3] Napster was unable to find a way to continue operations and faded away.

The void left by Napster's departure was filled by other businesses utilizing peer-to-peer technology, such as Aimster, Grokster, and Kazaa. While some of these applications can be differentiated from Napster in terms of their internal technical operation, they still follow the same basic peer-to-peer model as Napster and it is apparent that an overwhelming number of their customers are using it for the same purpose as they and others had used Napster - copying and distributing copyrighted works. By now it is well-settled that those users are infringing copyright. Notwithstanding that, there are still some who contend that such uses are not infringing. [4]

Mr. Chairman, make no mistake. The law is unambiguous. Using peer-to-peer networks to copy or distribute copyrighted works without permission is infringement and copyright owners have every right to invoke the power of the courts to combat such activity. Every court that has addressed the issue has agreed that this activity is infringement.[5] It can also be a crime and the perpetrators of such a crime are subject to fines and jail time.

Some have tried to rationalize or justify their illegal behavior by attacking the victim with allegations of inflated profits or unfair dealings with recording artists on the part of the recording industry. These diversionary tactics do not alter the fundamental fact that they are trying to defend illegal activity that takes place on peer-to-peer networks. For those who do not have sympathy for the recording industry, there are other victims as well. Since Napster, subsequent versions of peer-to-peer networks permit infringement of the works of other copyright owners, large and small, from motion picture studios to independent photographers and needlepoint designers. With broadband connections becoming more and more widespread, it is increasingly more common that the larger files containing full-length motion pictures are copied back and forth.(6) This problem is not shrinking; it is not static; it is growing.

There are some who argue that copyright infringement on peer-to-peer systems is not truly harmful to copyright owners and may even help them generate new interest in their products. The law leaves that judgment to the copyright owner and it ought not be usurped by self-interested third parties who desire to use the copyright owner's work.

II. Copyright Liability of Peer-to-Peer Proprietors

Copyright law has long recognized that those who aid and abet copyright infringement are no less culpable than the direct infringers themselves.(7) There are two types of this secondary liability. Contributory infringement occurs when "[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."(8) For purposes of this test, knowledge can be either actual or constructive - that is, having reason to know.(9) Vicarious liability occurs when one "has the right

and ability to supervise the infringing activity and also has a direct financial interest in such activities."[10]

Both of these concepts were brought to bear in the case against Napster. The Ninth Circuit agreed with the District Court that Napster had actual knowledge of the infringements it was facilitating from, for example, notices from aggrieved copyright owners.[11] There was little question but that Napster provided a material contribution in the form of "the site and facilities" for infringement.[12] Thus, Napster was determined to be a contributory infringer.

The Ninth Circuit also considered whether Napster was vicariously liable. It had no difficulty agreeing with the District Court that the infringing material on its network was a "draw" for customers, thus providing a direct financial benefit from the infringing activity.[13] The Ninth Circuit also agreed with the District Court that Napster had the ability to police its system, and thus that it had the right and ability to supervise its users' conduct.[14] Accordingly, Napster was found to be vicariously liable as well.

Thus it was that many felt reassured that the Ninth Circuit had confirmed that copyright law provides an effective and efficient way in which to address the massive infringements that can and do occur on peer-to-peer networks. Unfortunately, the *Napster* decision was not the final word on the matter.

Earlier this year, the Central District of California surprised many when it held that Grokster and Kazaa are not liable as secondary copyright infringers.[15] This decision departed from long-established precedent. For example, the court held that in order to establish contributory liability, it must be shown that "a defendant has actual - not merely constructive - knowledge of the infringement at a time

during which the defendant materially contributes to that infringement."(16) Were such a standard to be adopted it would eviscerate the doctrine of contributory infringement as it would be almost impossible to meet. It would encourage the kind of sophistry we have seen from the proprietors of some peer-to-peer applications: a denial of knowledge of infringements by their customers in the face of clear and uncontested evidence that such infringement is occurring on a mind-boggling scale. Mr. Chairman, these are people whose business plan is dependent upon massive copyright infringement and any application of the law that allows them to escape liability for lack of knowledge of those same infringements is inherently flawed.

Not only was the *Kazaa* decision wrong on the law, it has serious policy consequences as well. The historical doctrines of secondary liability have served copyright owners, courts, and the public well - they provide copyright owners with the ability to obtain relief against the root cause of a series of infringements without costly, inefficient, and burdensome suits against numerous individuals.(17) Without a viable doctrine of contributory liability, this option is severely curtailed and may present the copyright owner with the unenviable choice of either accepting unremedied infringements or filing numerous suits against the individual direct infringers.

If today's hearing leaves the Committee with the impression that the law is in flux with regard to the liability of proprietors of peer-to-peer technology, that is because it is. On one side is the *Napster* decision of the Ninth Circuit and the *Aimster* decision of the Seventh Circuit, both finding liability, albeit through different paths of analysis. On the other side is the *Kazaa* decision of the Central District of California, finding no liability for Kazaa and Grokster. Hanging over all of these cases is the Supreme Court's

decision in *Sony*. It is perhaps a commentary on that opinion that almost twenty years later, we still have such uncertainty that three courts seem to interpret and apply it in three different ways. I believe that the correct application of the doctrines of secondary liability and the *Sony* case should produce findings of liability for the proprietors of Kazaa and Grokster as well as Napster and Aimster. If the case law evolves so as to compel the opposite result, I believe that *Sony* should be revisited either by the Supreme Court or by Congress.

III. Suits Against Individuals

Unless and until the *Kazaa* decision is overruled, copyright owners are faced with the unenviable choice to which I referred earlier. They can either resign themselves to unremedied infringements on a previously unimaginable scale, or they can file infringement actions against individual peer-to-peer users. The recording industry has chosen the latter route.

While copyright owners have expressed regret that they have felt compelled to take this step, they need offer no apologies. As I have already said, people who use peer-to-peer technology for the unauthorized reproduction or distribution of copyrighted works are breaking the law. Surprisingly, many people do not appear to realize this. I have long advocated more public education about copyright. In a perfect world, this could be done in classrooms and with billboards. But ours is not a perfect world, and public education can also be accomplished through enforcement of copyright.

The threats of litigation and even the publicity about the subpoenas obtained by the RIAA have made clear to everyone that the so-called "file-sharing" of copyrighted works is not an innocent activity without legal

consequences. As a result, it is becoming more and more difficult for people engaged in such activity to claim that they did not know what they were doing is against the law. Of course, for some users of peer-to-peer technology, even knowledge that what they are doing is illegal will not be a sufficient disincentive to engage in such conduct. But whether or not these infringers know or care that it is against the law, the knowledge that such conduct may lead to expensive and burdensome litigation and a potentially large judgment should have a healthy deterrent effect. While we would like to think that everyone obeys the law simply because it is the law and out of a sense of obligation, we also know that laws without penalties may be widely ignored. For many people, the best form of education about copyright in the internet world is the threat of litigation. In short, if you break the law, you should be prepared to accept the consequences. Copyright owners have every right to enforce their rights in court, whether they are taking action against providers of peer-to-peer services designed to profit from copyright infringement or against the persons engaging in individual acts of infringement using such services.

IV. Statutory History and Interpretation of Subsection 512(h)

It is common sense that in order to be able to take action against the users of peer-to-peer networks, the copyright owner must know who those users are.[18] Congress foresaw this need and addressed it by including in the DMCA a process by which copyright owners can learn basic identifying information about alleged infringers from their internet service providers ("ISPs").[19]

The DMCA began as an effort to implement the 1996 WIPO Internet treaties.[20] Neither those treaties nor any other international instrument directly address the potential secondary liability of ISPs. However, as the treaty

implementing legislation moved forward in Congress, representatives of ISPs demanded that the legislation also limit their liability under such circumstances.(21) Congress heeded this call and provided the ISPs with a huge benefit - virtually no liability for qualifying ISPs. This was balanced by a carefully developed set of obligations in the DMCA. Among those balancing obligations was the requirement that ISPs "expeditiously" respond to subpoenas to provide identifying information about subscribers accused of copyright infringement so that the controversy could be settled in court.

At the time the DMCA was drafted, at least one representative of ISPs assured this Committee that ISPs desired a solution whereby "service providers and content owners...work as a partnership...."(22) It was asserted by that same representative that "[l]iability for copyright infringement should fall where it belongs, on the Web site operators, on those who create an infringing work or on those who reproduce it or perform it with actual knowledge of the infringement...."(23) The ability of copyright owners to utilize subsection 512(h) is a critical part of that partnership as is copyright owners' ability to impose liability against those who infringe copyright. It is regrettable that at least one major ISP now rejects the compromise and the balance of the DMCA.

Some now claim that the subpoena power of subsection 512(h) is inapplicable to the activity described in subsection 512(a). As the United States District Court for the District of Columbia recently held, the plain language of subsection 512(h) demonstrates that this interpretation is not correct.(24) I agree with the court's analysis.

Subsection 512(h) instructs service providers to expeditiously respond to a subpoena. The definition of "service provider" in section 512(k) always includes service

providers which qualify for the safe harbor in section 512(a). The court reasoned that this demonstrates Congress' intent to apply the subpoena power to "all service providers, regardless of the functions a service provider may perform under the four categories set out in subsections (a) through (d)."[25]

It has also been argued that the subpoena power applies only to subsection 512(c) because subsection 512(h)(2)(A) requires a copyright owner to supply "a copy of a notification described in subsection (c)(3)(A)". However, as the District Court pointed out, subsection 512(h) "is written without limitation or restriction as to its application."[26] It does not require that a notice be delivered. Had Congress wished to limit the application of the subpoena power, it would have simply said so in the law. It did not.[27]

The statutory text confirms the policy of compromise behind subsection 512 -- that copyright owners and ISPs work together to remedy infringement. Limiting the subsection 512(h) subpoena provisions as some have proposed would remove an important tool that parties need to remedy infringement efficiently in the peer-to-peer context.

When it enacted the DMCA, Congress did not carve out an exception from subsection 512(h) for transitory digital network communications, the activity covered by subsection 512(a). Service providers which engage in that activity received the benefits and burdens of the same bargain that service providers engaged in the other activity covered by section 512 received. In exchange for a powerful limitation on liability, they undertook some obligations, including the obligation to identify alleged infringers when served with a subsection 512(h) subpoena. When you enacted section 512, you made the right choice. There is no reason for the courts or Congress to have second thoughts about that decision.

I understand that the majority if not all of the 512(h) subpoenas that have been sought, have been sought in the United States District Court for the District of Columbia. Apparently this has necessitated the clerk of that court assigning additional staff to handle the workload. I do not take a position as to whether it is appropriate for a copyright owner to go to a single district court for subpoenas to service providers located outside that district. However, I am sympathetic to concerns about efficiency of the courts and fairness to ISPs located elsewhere in the country. There would certainly be advantages to the filing of these subpoena requests in the districts in which the ISPs are located.

V. Constitutional Challenges to Subsection 512(h)

The United States has intervened in the Verizon-RIAA litigation to defend the constitutionality of the DMCA. The Copyright Office has assisted the Justice Department in this effort and we firmly believe that subsection 512(h) is appropriate and constitutional. Although I am not an expert on constitutional law and I am not here to represent the Department of Justice, I will briefly summarize the arguments the United States made in its brief to the District Court.

The claim that subsection 512(h) violates the case and controversy requirement of the Constitution is belied by a review of other federal laws providing similar procedures, at least one of which has a 150 year pedigree.[28] The 512(h) procedure is also similar to discovery in advance of federal litigation pursuant to Federal Rule of Procedure 27, which finds its origins in the Judiciary Act of 1789.[29] Further, the subpoena power provided in subsection 512(h) does relate to cognizable Article III controversies, namely potential copyright infringement action as well as a dispute between

the copyright owner and the ISP over access to the subscriber information.[30]

The claim that subsection 512(h) violates the First Amendment does not withstand scrutiny. Subsection 512(h) does not proscribe spoken words or expressive or communicative conduct,[31] nor is there a realistic danger that it will significantly compromise a recognized First Amendment protection.[32] Section 512(h) merely requires a service provider to identify a person who appears to be engaging in copyright infringement, a necessary step before the copyright owner can initiate legal action. That action may range from an email or letter demanding that the alleged infringer cease and desist from the unlawful conduct to the filing of a lawsuit for copyright infringement. Section 512(h) does not offend the First Amendment any more than the filing of a lawsuit for copyright infringement. In fact, it is an essential tool for a copyright owner who intends to file such a lawsuit. Moreover, indeed, section 512 imposes sanctions on those who misuse the subpoena power, which serve to provide a safeguard.[33]

Although not addressed in the Government's briefs in intervention, I think it is important to put into context the privacy claims that some now put forward. Users of peer-to-peer networks are, by definition, opening their computers up to the world. There may be an illusion of anonymity to that activity, but we have come to learn that such connections can also make available the user's social security number, credit card numbers, and other vital information. By contrast, the 512(h) subpoena process typically involves disclosure to the copyright owner of no more than the subscriber's name, email address, phone number, and perhaps street address. This hardly seems like an invasion of privacy.

VI. Conclusion

The DMCA represents a carefully crafted and balanced bargain which utilizes the incentives created by pre-existing doctrines such as secondary liability as well as enlightened self-interest to encourage all stakeholders to work cooperatively to realize the potential of the Internet while respecting legal rights. Some are now selectively challenging key components of that bargain, particularly in the context of peer-to-peer technology. Taken together, the positions of Kazaa and Grokster, along with the arguments now made by Verizon, if they prevail, will leave copyright owners with little or no remedy against the most widespread phenomena of infringement in the history of this country. We know from past experience with Napster and current experience with Kazaa and Grokster that without a judicial remedy, this infringement will not stop, regardless of the availability of lawful alternatives. It is thus incumbent upon this Committee and this Congress to see to it that if the judiciary fails to enforce the DMCA and therefore fails to provide the protection to which copyrighted works are entitled, the legislature does.

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1. Submitted Testimony, Hank Barry, p. 7 (emphasis in original).

2. See Brief for the United States as *Amicus Curiae* at 11, n.1, 18, *A&M Records, Inc. v. Napster*, 293 F.3d 1004 (9th Cir. 2001) (Nos. 00-16401 & 00-16403).

3. *A&M Records v. Napster*, 293 F.3d 1004, 1014 (9th Cir. 2001) (hereinafter "*Napster*").

4. Los Angeles Times, "Tone Deaf to a Moral Dilemma?" (Sept. 2, 2003).

5. See *Napster* at 1014; *In re: Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) (hereinafter "*Aimster*"); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) (hereinafter "*Kazaa*").

6. See Gary Gentile, "Online Movie Service Quickens Downloads," Associated Press, September 3, 2003.

7. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911).

8. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

9. *Id.*

10. *Id.*

11. *Napster* at 1020-21.

12. *Id.* at 1022 (*quoting Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (hereinafter "*Fonovisa*")).

13. *Id.* at 1023 (quoting *Fonovisa* at 263-64).

14. *Id.* at 1023-24.

15. *Kazaa*, 259 F. Supp. 2d 1029.

16. *Id.* at 1036.

17. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 437, n.18 (hereinafter "*Sony*") (citing the "dance hall cases"); *Fonovisa*, 76 F.3d 259 (suit against the operator of a swap meet for infringing activity of third-party vendors).

18 The existence of section 512(h) is plain evidence that Congress did not view any existing procedures by which a suit could be filed against an unknown defendant as acceptable alternatives for copyright owners.

19. See 17 U.S.C. § 512(h).

20. See *Hearings on S. 1121 Before the Senate Judiciary Committee*, 105th Cong. 25 (statement of George Vradenburg, III) (representing "over 1,400 Internet service providers, content creators, telephone companies, among others. . .").

21. *Id.*

22. *Id.*

23. *Id.*

24. *In re: Verizon Internet Services, Inc., Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 30 (D.D.C. 2003).

25. *Id.* at 31.

26. *Id.* at 33.

27. *Id.*

28. Brief for Intervenor United States of America, p. 6, *In re: Verizon Internet Services, Inc., Subpoena Enforcement Matter*, 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-MS-0040 (JDB)).

29. *Id.* at 10-11.

30. *Id.* at 9, 13.

31. *Id.* at 15-16.

32. *Id.* at 16-18.

33. *Id.* at 17-18.